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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1506.

THE CITY AND COUNTY OF SAN FRANCISCO, PLAINTIFF IN ERROR,

*vs.*

ANDREW J. ITSELL ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Transcript from Superior Court | 3 | 1 |
| Complaint | 3 | 1 |
| Answer of Andrew J. Itsell *et ux* | 9 | 4 |
| Note as to answers of other defendants | 21 | 9 |
| Findings | 21 | 9 |
| Judgment | 37 | 17 |
| Notice of appeal | 41 | 19 |
| Stipulation as to transcript | 43 | 19 |
| Clerk's certificate | 44 | 20 |
| Proof of service of copy of transcript | 45 | 20 |
| Submission of cause | 46 | 20 |
| Judgment | 47 | 21 |
| Opinion | 48 | 21 |
| Bond | 49 | 23 |
| Citation | 52 | 25 |
| Petition for writ of error | 56 | 26 |
| Writ of error | 59 | 27 |
| Clerk's certificate | 61 | 29 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 13, 1889.

1 In the Supreme Court of the United States.

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff in Error,
*vs.*
ANDREW J. ITSELL *et als.*, Defendants in Error. } No. —.

*Transcript of Record on Writ of Error.*

Geo. Flournoy, city and county attorney, and John B. Mhoon and John L. Love, attorneys for plaintiff in error.

Filed this — day of ——, —.

—— ——, *Clerk*,
By —— ——,
*Deputy Clerk.*

2 Original.

In the Supreme Court of the State of California.

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff and Appellant,
*vs.*
ANDREW J. ITSELL *et als.*, Defendants and Respondents. } No. 12952.

*Transcript on Appeal.*

Geo. Flournoy, Jr., city and county attorney, and Flournoy & Mhoon, attorneys for plaintiff.

Filed this 28th day of Nov., 1888.

J. D. SPENCER, *Clerk*,
By BEN. M. MADDOX,
*Deputy Clerk.*

3 In the Supreme Court of the State of California.

*Transcript on Appeal.*

Complaint.

In the Superior Court of the City and County of San Francisco, State of California, Department No. 8.

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff,
*vs.*
ANDREW J. ITSELL and Others, Defendants. } No. 19160.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Now comes The City and County of San Francisco, by John L. Love, its attorney and counsellor, and complaining of Andrew J. Itsell, Franz W. Appiarius, M. A. Bourne, Jose Baptista, Pierre Berges, J. Berges, E. M. Block, Edward A. Bullis, Frederick Brown, L. Brunkhorst, John A. Bagnall, John G. Bloomer, Henry Bischoff,

William Burke, Adeline A. Bacon, Martha Ann Chandler, J. S.
4 Cluff, Orrin S. Carvill, Delia Carvill, Oliver C. Carroll, Hannah Cohn, Meyer A. Cohn, Michael Crotty, Henry C. Carter, Alfred N. Cables, Jeremiah J. Donovan, George C. Dawson, John B. Doran, John Elitch, Mary Elitch, Nellie B. Fuller, Manuel F. Frietas, Andriano Frediano, Henry Ferguson, E. R. Foisom, B. Goldstone, Frank Garrissere, Jacob Goldstone, Edward Gilberts, Albert Gunther, L. Gottig, Gabriel Gearardi, James Garrod, John Hourcade, Ellen Higgins, L. T. Hughes, L. Hertz, C. Henschen, Catherine M. Henschen, J. H. D. Helms, Robert R. Hill, Jacob Jaggi, Aimee Koff, George A. Knight, John Kelly, William J. Kramer, Samuel W. Latz, Mark Levison, L. W. Lockwood, Jennie Lord, John Martens, Joseph Muller, John J. Maginis, John MacKenzie, Patrick A. Mahoney, S. L. Macumber, John N. McViegh, Frank Morton, Albert McNee, Alexander McNee, David Myers, Thomas K. Noble, Jonathan Newcomb, Jr., James O'Brien, Robert O'Neill, Hugh J. Owen, Taldervar Peterson, Michael J. Rodrigues, Charles F. Reed, William A. Robertson, Joseph E. Shain, Mary E. Shain, L. Schwartz, B. Stirman, F. E. H. Schlott, Charles W. Still, Jane N. Still, John Sheehan, C. de la Torre, Louis Talcott, M. E. Talcott, E. A. Vizard, Maurice Van Loewenjels, D. P. Whelan, G. I. Ward, Charlotte Ward, William D. Walsh, Adolph H. Weske, Elouise Weske, Anna M. M. Wiesenhavern, David Wolf, Milton W. Whitney, Morris Wolf, Robert M. Welch,
5 William A. West, Henry Wreden, Joseph Zinnen, K. Zinnen, German Savings and Loan Society, Hibernia Savings and Loan Society, La Societe Francaise d'Epargnes et de Prevoyance Mutuelle, San Francisco Savings Union, Henry C. Campbell, trustee, Thadeus B. Kent, trustee, The Board of Education of the City and County of San Francisco—

John Doe Abbott, Richard Roe Alexander, William Poe Ammerup, John Doe Buckley, John Doe Black, Richard Roe Black, William Poe Black, John Doe Crank, Richard Roe Crank, William Poe Crank, John Doe Doe, Richard Roe Doe, William Poe Doe, John Doe Essex, Richard Roe Essex, William Poe Essex, John Doe Fulano, Richard Roe Fulano, William Poe Fulano, John Doe Green, Richard Roe Green, William Poe Green, John Doe Hayward, John Doe Ham, Richard Roe Ham, William Poe Ham, John Doe Ivory, Richard Roe Ivory, William Poe Ivory, John Doe Jenks, Richard Roe Jenks, William Poe Jenks, John Doe Konk, Richard Roe Konk, William Poe Konk, John Doe Lane, Richard Roe Lane, William Poe Lane, John Doe Metz, John Doe Moon, Richard Roe Moon, William Poe Moon, John Doe Nihil, Richard Roe Nihil, William Poe Nihil, John Doe Oaks, Richard Roe Oaks, William Poe Oaks, John Doe Perkins, Richard Roe Perkins, William Poe Perkins, John Doe Quiz, Richard Roe Quiz, William Poe Quiz, John Doe Roe, William Poe Roe, Richard Roe Roe, John Doe Smith, Richard Roe Smith, William
6 Poe Smith, John Doe Trout, Richard Roe Trout, William Poe Trout, John Doe Ulster, Richard Roe Ulster, William Poe Ulster, John Doe Various, Richard Roe Various, William Poe Various, Xerxes Xerxes, Yusef Y. Yateley, Zenophon Zenophon, defendants herein, shows to the court and alleges—

I.

That plaintiff is and at all the times hereinafter mentioned was a municipal corporation organized and existing under the laws of the State of California.

II.

That plaintiff is ignorant of the names of certain of the defendants to this action, to wit, those defendants who are designated above by fictitious names as follows, viz:

John Doe Abbott, Richard Roe Alexander, William Poe Ammerup, John Doe Buckley, John Doe Black, Richard Roe Black, William Poe Black, John Doe Crank, Richard Roe Crank, William Poe Crank, John Doe Doe, Richard Roe Doe, William Poe Doe, John Doe Essex, Richard Roe Essex, William Poe Essex, John Doe Fulano, Richard Roe Fulano, William Poe Fulano, John Doe Green, Richard Roe Green, William Poe Green, John Doe Hayward, John Doe Ham, Richard Roe Ham, William Poe Ham, John Doe Ivory, Richard Roe Ivory, William Poe Ivory, John Doe Jenks, Rich-
ard Roe Jenks, William Poe Jenks, John Doe Konk, Rich-
7 ard Roe Konk, William Poe Konk, John Doe Lane, Richard Roe Lane, William Poe Lane, John Doe Metz, John Doe Moon, Richard Roe Moon, William Poe Moon, John Doe Nihil, Richard Roe Nihil, William Poe Nihil, John Doe Oaks, Richard Roe Oaks, William Poe Oaks, John Doe Perkins, Richard Roe Perkins, William Poe Perkins, John Doe Quiz, Richard Roe Quiz, William Poe Quiz, John Doe Roe, William Poe Roe, Richard Roe Roe, John Doe Smith, Richard Roe Smith, William Poe Smith, John Doe Trout, Richard Roe Trout, William Poe Trout, John Doe Ulster, Richard Roe Ulster, William Poe Ulster, John Doe Various, Richard Roe Various, William Poe Various, Xerxes Xerxes, Yusef Y. Yateley, Zenophon Zenophon; and plaintiff prays that when their true names, respectively, may be discovered this complaint may be amended by inserting the true instead of the said fictitious names of said defendants, respectively.

That at all the times mentioned herein the said defendants, The German Savings and Loan Society, The San Francisco Savings Union, The Societe Francaise d'Epargnes et de Prevoyance Mutuelle, The Hibernia Savings and Loan Society, respectively, were and now are corporations organized and existing under the laws of the State of California.

III.

That plaintiff is and on and long prior to the 20th day of
8 December, 1883, was seized in fee in trust for the use of the State of California and of the people of the city and county of San Francisco, as a public plaza, park, common, or square, and entitled to the possession of the following-described real property situated in said city and county of San Francisco, bounded on the

east by Steiner street, south by O'Farrell street, west by Scott street, north by Geary street, being a portion of land known as Hamilton square or plaza.

IV.

That while plaintiff was so seized the defendants herein afterwards, to wit, on said last-mentioned day, wrongfully and without right or title entered upon said land and ejected plaintiff and the parties for whom and to whose use as aforesaid plaintiff held the same in trust therefrom and from every part thereof; and said defendants have ever since withheld and do now withhold the possession thereof and of every part thereof from plaintiff and from said parties.

V.

That the value of the use and occupation of said land during the time it has been so withheld as aforesaid is the sum of one hundred and fifty thousand dollars, which sum is the amount of damage to plaintiff by reason of such withholding.

9 Wherefore plaintiff prays judgment against defendants for the restitution of said premises and the said sum of one hundred and fifty thousand dollars damages, besides costs of suit.

JOHN L. LOVE,
*City and County Attorney, Attorney for Plaintiff.*

In the Superior Court of the City and County of San Francisco.

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff,
—
ANDREW J. ITSELL *et als.*, Defendants.

Now come the defendants, Andrew J. Itsell and Aggie M. Itsell, his wife, the latter being sued as John Doe Perkins, and, for answer to the complaint of the plaintiff herein—

10 Deny generally and specifically each and every allegation in said complaint contained, except that these defendants admit that they are in the possession of that certain lot of land situate in the said city and county of San Francisco and bounded and described as follows, to wit:

Commencing at a point on the north line of O'Farrell street distant westerly 377½ feet from the westerly line of Steiner street, thence running westerly on said line of O'Farrell street 22 feet, thence at right angles northerly 82½ feet to the southerly line of Elliot Park street, thence easterly along said line of Elliot Park street 22 feet, and thence at right angles southerly 82½ feet to the point of commencement.

And for a further and separate answer and defense these defendants aver that the plaintiff ought not to have or maintain this action against these defendants or to assert any right or title to the lot first specifically described in this answer, because, as they aver, on the 11th day of September, 1879 (F. M., D. C., S. C.), one Edward F. Palmer, as plaintiff, commenced an action in the then district

court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco against the said City and County of San Francisco (the plaintiff in this action), as defendant, and which said court then and there had full and
11 complete jurisdiction of the subject-matter of said action and of the parties thereto, and in his complaint in said action the said Edward F. Palmer alleged that he then and there was and for a long time theretofore had been the owner and in the possession of a certain tract of land in said complaint described, which tract embraced and included the premises described in the complaint in this action, and in said complaint it was further alleged that the plaintiff therein claimed the title in fee to said tract of land, and that the defendant therein (the plaintiff in this action) claimed an interest and estate in said premises adverse to the plaintiff therein, and further alleged that the claims of the said defendant therein were without any right whatever, and that said defendant therein had not any right, title, interest, or estate in said premises nor in any part thereof; and said plaintiff, Edward F. Palmer, by said complaint, prayed judgment that he be adjudged and declared to be the owner of said premises, and that it be adjudged and declared that the said defendant, The City and County of San Francisco, had no estate or interest whatever in said premises and be debarred from asserting any claim whatever therein. The defendant therein, the said City and County of San Francisco, duly appeared in said action and answered said complaint and denied all the allegations of the complaint, except the allegation that it claimed title to said premises adverse to the plaintiff, Edward F. Palmer.

12 That afterwards and on the 14th day of September, 1869, by consent of the parties thereto, the said action was referred to a referee to try all the issues in said action and to report a finding and judgment thereon.

That thereafter the said action came on regularly for trial before said referee, and after having heard the evidence offered by the said parties the said referee made and filed his written finding and decision, and thereby found—

1. That on the 11th day of September, 1869, the plaintiff, Edward F. Palmer, was and still continued to be the lawful owner in fee simple absolute of the premises described in the complaint in said action.

2. That on the day last aforesaid the plaintiff, Edward F. Palmer, was and still continued to be in the actual, open, notorious, and exclusive possession of said premises and every part thereof.

3. That on the day last aforesaid the said defendant, The City and County of San Francisco, claimed an interest and estate therein adverse to the said plaintiff, Edward F. Palmer.

4. That the claim of the defendant, The City and County of San Francisco, was without any right or foundation whatever, and that said defendant, The City and County of San Francisco, had not any estate, right, title, or interest whatever in said premises or any part thereof.

13 And as conclusions of law the said referee found that the

said plaintiff, Edward F. Palmer, was entitled to the relief prayed for in his complaint.

That the said referee, with said findings, reported a judgment, which was filed and entered by said court in said action on the 29th day of November, 1869; and by said judgment it was ordered, adjudged, and decreed that said findings and report of said referee be in all things confirmed; and by said judgment it was further ordered, adjudged, and decreed that the plaintiff, Edward F. Palmer, was at the time of the commencement of said action and still was the lawful owner in fee simple absolute of the premises described in the complaint therein and that the said defendant, The City and County of San Francisco, had not any estate, right, title, or interest therein, and that said defendant, The City and County of San Francisco, be, and by said judgment was, forever thereafter enjoined, restrained, and debarred from asserting or claiming any estate, right, title, or interest in said premises or any part thereof.

That said judgment still remains in full force and effect, not reversed or otherwise vacated.

And these defendants further aver that prior to the commencement of this action they had succeeded to and acquired the said title and possession of the said Edward F. Palmer to the lot of land
14 first described in this answer, and that the plaintiff in this action has no other or different title or claim of title thereto than it had at the time of the commencement of said action of Edward F. Palmer against the said city and county of San Francisco.

And, for a further and separate answer and defence to said action, these defendants aver that the plaintiff ought not to have or maintain this action against these defendants or to assert any right, title, or interest to the lot first specifically described in this answer, because, as they aver, that on the 12th day of July, 1869, one Edward Tompkins was in the possession of a tract of land larger than and embracing the premises in controversy herein and claimed to be the owner thereof; and the said plaintiff, the said City and County of San Francisco, also claimed an interest or estate therein adverse to said Edward Tompkins. It was agreed by and between said city and county and Tompkins to settle and compromise their adverse claims in the manner mentioned and described in the following order of the board of supervisors of the city and county of San Francisco, to wit:

Order number eight hundred and eighty-three, providing for an exchange of deeds between the city and county of San Francisco and Edward Tompkins to certain land in what is known as "Hamilton square."

The people of the city and county of San Francisco do ordain as follows:

15 SECTION 1. Whereas the city and county of San Francisco and Edward Tompkins are the owners of the following-described tract of land, namely: Commencing at a point at the northwesterly corner of the Merritt claim and the southeasterly corner of the Hoadley claim, running thence easterly along the northerly

line of the Merritt claim six hundred and ten feet, more or less, to Steiner street; thence southerly along the westerly line of Steiner street to O'Farrell street; thence westerly along O'Farrell street six hundred and fifty-two feet and six inches, more or less, to the westerly line of the Merritt claim; thence northerly along the said westerly line of the Merritt claim three hundred and fifteen feet, more or less, to the place of beginning.

And whereas said Tompkins has proposed to segregate and partition the respective interests of the owners thereof, which said proposition the city and county of San Francisco is desirous of accepting, and in settlement of the rights, interests, and privileges of the said parties and to effectuate said segregation and partition on his part said Edward Tompkins has granted, bargained, sold, and conveyed to the city and county of San Francisco all that certain parcel of land situated in said city and county of San Francisco described as follows, to wit:

16 Commencing at a point in the southerly line of Geary street continued through Hamilton square, where the northerly line of the Merritt tract intersects the same, running thence westerly along the southerly line of Geary street continued to the westerly line of the Merritt tract; thence northerly along said westerly line of the Merritt tract thirty-nine (39) feet, more or less, to the northwesterly corner of the said Merritt tract and the southeasterly corner of the Hoadley tract; thence easterly along the northerly boundary of the said Merritt tract to the place of beginning, it being intended hereby to convey to the city and county of San Francisco all the lands of the said Merritt tract owned by said Edward Tompkins, situated or being in Geary street continued, of the width of sixty-eight feet and nine inches; also that certain other parcel or tract of land commencing on the northerly line of O'Farrell street, distant five hundred and fifty-two and one-half (552½) feet westerly from the intersection of said line of O'Farrell street with the westerly line of Steiner street, running thence northerly at right angles to O'Farrell street two hundred and seventy-five feet to the southerly line of Geary street as continued; thence westerly and parallel to O'Farrell street and along the southerly line of Geary street continued to the westerly boundary of the Merritt tract; thence southerly along said westerly boundary of the said Merritt tract two hundred and seventy-five (275) feet, more or less, to
17 its intersection with the northerly line of O'Farrell street; thence easterly along the northerly line of O'Farrell street one hundred (100) feet, more or less, to the place of beginning:

Now, therefore, on the delivery of said last-named conveyances to the city and county of San Francisco and in consideration thereof and to effectuate said segregation and partition on the part of said city and county of San Francisco, the mayor of said city and county of San Francisco is hereby authorized and empowered to make, execute, and deliver to the said Edward Tompkins, his legal representatives or assigns, a good and sufficient deed of conveyance of the city and county of San Francisco, remising, releasing, and quitclaiming to the said Edward Tompkins or his legal

representatives or assigns all the right, title, and interest of the said city and county of San Francisco in and to all the following-described piece or parcel of land, to wit:

Commencing at the northwesterly corner of Steiner and O'Farrell streets, running thence northerly along the westerly line of Steiner street two hundred and seventy-five feet to the southerly line of Geary street continued at the width of sixty-eight feet and nine inches; thence westerly at right angles with Steiner street and along the southerly line of Geary street continued, at a width of sixty-eight feet and nine inches, five hundred and fifty-two feet and six inches; thence southerly and parallel with Steiner street
18 two hundred and seventy-five feet to the northerly line of O'Farrell street; thence easterly along the northerly line of O'Farrell street five hundred and fifty-two feet and six inches to the place of beginning.

That said order, after its introduction into and adoption by said board, was published, with the ayes and nays, in a daily newspaper published in said city for five successive days, and afterwards was taken up and finally passed by said board of supervisors on the 19th day of July, 1869, and on the 21st day of July, 1869, was approved by the president of said board.

That the said Edward Tompkins had, prior to the passage of said order and in the consummation of the said agreement of compromise and partition, granted, bargained, sold, and conveyed to the said city and county of San Francisco the tracts of land mentioned in said order as having been conveyed by him.

And the said city and county of San Francisco, in consideration thereof and of the said agreement, did, on the 22d day of July, 1869, by its deed dated on that day and duly executed and delivered on its behalf by the mayor of said city and county of San Francisco, remise, release, quitclaim, and convey to the said Edward Tompkins the tract of land lastly described in said order, and which tract so conveyed embraced and included the lot of land first described in this answer; and the said city and county of San Francisco
19 also, in consideration thereof and of the said agreement, did, by deed dated on (F. M., D. C., S. C.) the 22d day of July, 1869, and duly executed, acknowledged, and delivered on the 5th day of August, 1869, by its mayor in its behalf, conveyed the premises last mentioned in said order to said Edward Tompkins.

And these defendants further aver that the said city and county of San Francisco entered into and took possession of the tracts of land conveyed to it as aforesaid by the said Tompkins at or about the date of said deed and have ever since been in the occupation and possession thereof.

That the said order No. 883 of said board of supervisors was, by an act of the Legislature of the State of California entitled "An act to confirm order number 883 of the board of supervisors of the city and county of San Francisco," and approved February 19, 1870, ratified and confirmed and all instruments and conveyances which had been made, executed, and delivered in conformity with the provisions of said order, including said deed of the city and county of

San Francisco to said Edward Tompkins, were by said act ratified, confirmed, and validated in all respects.

That these defendants have by mesne conveyances from said Edward Tompkins prior to the commencement of this action acquired the title of said Tompkins to the portion of said land which is first in this answer specifically described, and, in faith of the aforesaid order, act, and conveyance, paid therefor the full value of said lot; and these defendants and their grantors have in the like faith erected dwelling-houses and other improvements on said lot of great value, to wit, of the value of over $1,000.

That the said city and county of San Francisco has every year since said conveyance to Edward Tompkins assessed and taxed for State, county, and municipal purposes not only the said lot of land, but also the improvements erected thereon as aforesaid, and these defendants and their grantors have paid all the taxes which have been as aforesaid assessed and levied on said lot, and the said city and county of San Francisco never after the date of order asserted any right or title to the property in controversy until the commencement of this suit.

And for a further and separate answer and defense to said action these defendants aver that the cause of action of the plaintiff, if any it has, is barred by the provisions of sections 318, 319, 322, 323, 324, and 325 of the Code of Civil Procedure of this State.

Wherefore said defendants pray to be hence dismissed with costs of suit.

WM. & GEO. LEVISTON,
THOS. D. RIORDAN,
*Attorneys for said Defendants, A. J. Itsell and Aggie M. Itsell.*

The answers of the other defendants in error were all separate and substantially the same in words and figures, differing only in the names of the parties and the description of the property involved.

(Title of court and cause.)

*Findings.*

This cause came on to be tried on the 5th day of September, 1887, before the court without a jury, a trial by jury having been waived by the parties, and was tried upon the issues raised by the complaint and the answers of the defendants, Mark Levison, John Martens, Charles Lagomorsino, Catherine Ennis, Fred. Martens, Charles Meyer, Geo. Ludwig, John Wolters, Edward A. Bullis, Alfred H. Cables, (F. M., D. C., S. C.), E. M. Block, Frank Morton, Jane N. Still, Charles W. Still, Catherine M. Henschen, Frank Bishop, Geo. C. Dawson, Henry Bischopp, Henry C. Carter, Rudolph Ohe, Albert Ohe, B. Walsh, Adolph Weske, Elouise Weske, Charles F. Reed, Mrs. Charles F. Reed, John Hourcade, Virginia Hourcade, Adriano Fridiano, Samuel W. Lazt, Meyer A. Cohn, Mrs. L. A. Tracy, M. A. Bourne, Richard I. Whelan, John N. McVeigh, Elizabeth Vizard, J. H. S. Helms, C. W. Parker, Catilina de la Torre, Bertha Goldstone,

Mary E. Shain, J. E. Shain, Grace Shain, Jose Baptista, James F. Brennan, Edward H. Brennan, Mary A. Brankin, W. H. Wells, M. A. Wells, Jos. Muller, David Wolf, Mrs. M. T. Wolf, Pierre Berges, Frank Garrissere, Maurice Van Lavenfels, W. L. Odell, M. A. Whitney, Robert Hill, Jacob Goldstone, Jane Beatus, Manuel Silveira, John J. Maginnis, E. R. Folsom, Mary W. Folsom, John Berges, —— Bachman, A. Grosset, Thos. K. Noble, Robert F. O'Neill, Wm. M. Cornwall, Mrs. W. H. Cornwall, M. J. Rodrigue, F. W. Appiarius, Henry Wreden, Frederica Appiarius, Charlotte Ward, Nellie B. Fuller, Annie S. Band, H. F. Band, Michael Crotty, John McKenzie, Mary J. McKenzie, John D. Broder, Minnie B. Hall, Mrs. L. Moss, Edward Gilberts, Catherine Gilberts, John A. Bagnall, Geo. A. Knight, Mary E. Talcott, Louis Talcott (F. M., D. C., S. C.), Henrietta Hertz, H. Kohlberg (served as H. Goldby), Andrew J. Itsell, Aggie M. Itsell, Delia Carvill, Orrin S. Carvill, John Elitch, Jr., Mary Elitch, Hugh J. Owen, Catherine Whelan, John G. Bloomer, Augusta Bloomer, Daniel P. Whelan, Jacob Jaggi, Wilhelmine
23 Jaggi, Patrick A. Mahoney, Frederick Brown, Albert McNee, Laura W. Lockwood, W. J. Kramer, Mrs. W. J. Kramer, Jeremiah J. Donovan, Annie M. Donovan (served as Mrs. J. J. Donovan), William D. Walsh, Mrs. W. D. Walsh, Jennie Lord, J. S. Mitchell, Albert Gunther, Stephen Macumber, Annie Macumber, William Burke, Mrs. William Burke, A. D. Pratt, Mary Pratt, Anna M. M. Wiesenhassen, Manuel F. Frietas, William Schmidt, Harriet A. Carroll, Oliver C. Carroll, John Kelly, G. Gerardi, L. Gottig, Flora Howe, Mrs. Jas. Crawford, —— Rodgers, Hannah Cohn, Johnathan Newcomb, Jr., Johnathan Newcomb, Sr., Mrs. J. Newcomb, Jr., Toldevar Peterson, Sophie Peterson, David Meyers, W. A. Robertson, Katherina Zinnen, Joseph Zinnen, James Garrod, Mrs. James Garrod, James O'Brien, Mrs. James O'Brien, The German Savings and Loan Society, The San Francisco Savings Union, The Societe Francaise d'Epargnes et de Prevoyance Mutuelle, and The Hibernia Savings and Loan Society, all of whom have answered herein.

And, after hearing the testimony and the argument of counsel and the cause having been submitted, the court finds as the facts in the case:

I.

That plaintiff is, as stated in the complaint, a municipal corporation, and the four last-named defendants are corporations, as alleged in the complaint.

24 II.

That plaintiff is not and was not at the time of the commencement of this action the owner or seized in fee in trust for any person or entitled to the possession of any part of the land described in the complaint which is described in the answer of the above-named defendants or of which said defendants were in possession of when the action was commenced.

III.

That on or about the 12th day of July, 1869, it was agreed by and between The City and County of San Francisco, the plaintiff herein, and one Edward Tompkins to settle and compromise certain adverse claims to the premises hereinafter described in the manner mentioned and described in the following order of the board of supervisors of the city & county of San Francisco (F. M., D. C., S. C.), and thereupon the following order was introduced in and adopted by said board of supervisors, viz:

Order number eight hundred and eighty-three, providing for an exchange of deeds between the city and county of San Francisco and Edward Tompkins to certain land in what is known as "Hamilton square."

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. Whereas the city and county of San Francisco and Edward Tompkins are the owners of the following-described tract of land, namely: Commencing at a point at the northwesterly corner of the Merritt claim and the southeasterly corner of the Hoadley claim, running thence easterly along the northerly line of the Merritt claim six hundred and ten feet, more or less, to Steiner street; thence southerly along the westerly line of Steiner street to O'Farrell street; thence westerly along O'Farrell street six hundred and fifty-two feet and six inches, more or less, to the westerly line of the Merritt claim; thence northerly along the said westerly line of the Merritt claim three hundred and fifteen feet, more or less, to the place of beginning.

And whereas said Tompkins has proposed to segregate and partition the respective interests of the owners thereof, which said proposition the city and county of San Francisco is desirous of accepting; and in settlement of the rights, interests, and privileges of the said parties and to effectuate said segregation and partition on his part said Edward Tompkins has granted, bargained, sold, and conveyed to the city and county of San Francisco all that certain parcel of land situated in said city and county of San Francisco described as follows, to wit:

Commencing at a point in the southerly line of Geary street continued through Hamilton square where the northerly line of the Merritt tract intersects the same, running thence westerly along the southerly line of Geary street continued to the westerly line of the Merritt tract; thence northerly along said westerly line of the Merritt tract thirty-nine (39) feet, more or less, to the northwesterly corner of the said Merritt tract and the southeasterly corner of the Hoadley tract; thence easterly along the northerly boundary of the said Merritt tract to the place of beginning, it being intended hereby to convey to the city and county of San Francisco all the lands of the said Merritt tract owned by said

Edward Tompkins, situated or being in Geary street continued, of the width of sixty-eight feet and nine inches; also that certain other parcel or tract of land commencing on the northerly line of O'Farrell street, distant five hundred and fifty-two and one-half (552½) feet westerly from the intersection of said line of O'Farrell street with the westerly line of Steiner street, running thence northerly at right angles to O'Farrell street two hundred and seventy-five feet to the southerly line of Geary street as continued; thence westerly and parallel to O'Farrell street and along the southerly line of Geary street continued to the westerly boundary of the Merritt tract; thence southerly along the (F. M., D. C., S. C.) westerly boundary of the said Merritt tract two hundred and seventy-five (F. M., D. C., S. C.) feet, more or less, to its intersection with the northerly line of O'Farrell street; thence easterly along the northerly line of O'Farrell street one hundred (100) feet, more or less, to the place of beginning:

Now, therefore, on the delivery of said last-named conveyances to the city and county of San Francisco and in consideration thereof and to effectuate said segregation and partition on the part of said city and county of San Francisco, the mayor of said city and county of San Francisco is hereby authorized and empowered to make, execute, and deliver to the said Edward Tompkins, his legal representatives or assigns, a good and sufficient deed of conveyance of the city and county of San Francisco, remising, releasing, and quitclaiming to the said Edward Tompkins or his legal representatives or assigns all the right, title, and interest of the said city and county of San Francisco in and to all the following-described piece or parcel of land, to wit:

Commencing at the northwesterly corner of Steiner and O'Farrell streets, running thence northerly along the westerly line of Steiner street two hundred and seventy-five feet to the southerly line of Geary street continued at the width of sixty-eight feet and nine inches; thence westerly at right angles with Steiner street and along the southerly line of Geary street continued at a width of sixty-eight feet and nine inches five hundred and fifty-two feet and six inches; thence southerly and parallel with Steiner street two hundred and seventy-five feet to the northerly line of O'Farrell (F. M., D. C., S. C.); thence easterly along the northerly line of O'Farrell street five hundred and fifty-two feet and six inches to the place of beginning.

That said order, after its introduction into and adoption by said board, was published with the ayes and nays in a daily newspaper published in said city for five successive days, and afterwards was taken up and finally passed by said board of supervisors on the 19th day of July, 1869, and on the 21st day of July, 1869, was approved by the president of said board.

That the said Edward Tompkins had, prior to the passage of said order and in the consummation of the said agreement of compromise and partition, granted, bargained, sold, and conveyed to the said city and county of San Francisco the tracts of land mentioned in said order as having been conveyed by him.

And the said city and county of San Francisco, in consideration

thereof and of the said agreement, did, on the 22d day of July, 1869, by its deed dated on that day and duly executed and delivered on its behalf by the mayor of said city and county of San Francisco, remise, release, quitclaim, and convey to the said Edward Tompkins the tract of land lastly described in said order, and which tract so conveyed embraced and included the lot of land first described in the answer of the foregoing-named defendants (F. M., D. C., S. C.); and the said city and county of San Francisco also, in consideration thereof and of the said agreement, did, by deed dated the 22d day of July, 1869, and duly executed, acknowledged, and deliv-
29 ered on the 5th day of August, 1869, by its mayor in its behalf, conveyed the premises last mentioned in said order to said Edward Tompkins.

Thereupon the said city and county of San Francisco entered into and took possession of the tracts of land conveyed to it as aforesaid by the said Tompkins (F. M., D. C., S. C.), and has ever since been in the occupation and possession thereof.

That the said order No. 883 of said board of supervisors was, by an act of the Legislature of the State of California entitled "An act to confirm order number 883 of the board of supervisors of the city and county of San Francisco" and approved February 19, 1870, ratified and confirmed, and all instruments and conveyances which had been made, executed, and delivered in conformity with the provisions of said order, including said deed of the city and county of San Francisco to said Edward Tompkins, were by said act ratified, confirmed, and validated in all respects.

That on the 23d day of July, 1869, the said Edward Tompkins executed and delivered to Edward F. Palmer a deed dated on that day by which he granted, bargained, and sold to said Palmer the tract of land conveyed as aforesaid to said (F. M., D. C., S. C.) Tompkins by the said city and county of San Francisco, and which embraced and included the lots of land described in the answers of the above-named defendants.

30 IV.

That on the 11th day of September, 1869, one Edward F. Palmer, as plaintiff, commenced an action in the then district court of the fifteenth judicial district of the State of California in and for the city and county of San Francisco against the said City and County of San Francisco (the plaintiff in this action), as defendant, and which said court then and there had full and complete jurisdiction of the subject-matter of said action and of the parties thereto; and in his complaint in said action the said Edward F. Palmer alleged that he then and there was and for a long time theretofore had been the owner and in the possession of a certain tract of land in said complaint described in the answers of the said defendant, and in said complaint it was further alleged that the plaintiff therein claimed the title in fee to said tract of land, and that the defendant therein (the plaintiff in this action) claimed an interest and estate in said premises adverse to the plaintiff therein, and further alleged

that the claims of the said defendants therein were without any right whatever, and that said defendant therein had not any right, title, interest, or estate in said premises nor in any part thereof; and said plaintiff, Edward F. Palmer, by said complaint, prayed judgment that he be adjudged and declared to be the owner of
31 said premises, and that it be adjudged and declared that the said defendant, The City and County of San Francisco, had no estate or interest whatever in said premises and be debarred from asserting any claim whatever therein. The defendant therein, the said City and County of San Francisco, duly appeared in said action and answered said complaint and denied all the allegations of the complaint except the allegation that it claimed title to said premises adverse to the plaintiff, Edward F. Palmer.

That afterwards and on the 14th day of September, 1869, by consent of the parties thereto, the said action was referred to a referee to try all the issues in said action and to report a finding and judgment thereon.

That thereafter the said action came on regularly for trial before the said referee, and, after having heard the evidence offered by the said parties, the said referee made and filed his written finding and decision, and thereby found—

1. That on the 11th day of September, 1869, the plaintiff, Edward F. Palmer, was and still continued to be the lawful owner in fee simple absolute of the premises described in the complaint in said action.

2. That on the day last aforesaid the plaintiff, Edward F. Palmer, was and still continued to be in the actual, open, notorious, and exclusive possession of said premises and every part thereof.

32 3. That on the day last aforesaid the said defendant, The City and County of San Francisco, claimed an interest and estate therein adverse to the said plaintiff, Edward F. Palmer.

4. That the claim of the defendant, The City and County of San Francisco, was without any right or foundation whatever, and that said defendant, The City and County of San Francisco, had not any estate, right, title, or interest whatever in said premises or any part thereof.

And as conclusions of law the said referee found that the said plaintiff, Edward F. Palmer, was entitled to the relief prayed for in his complaint.

That the said referee, with said findings, reported a judgment which was thereupon filed and entered by said court in said action, and by said judgment it was ordered, adjudged, and decreed that said findings and report of said referee be in all things confirmed; and by said judgment it was further ordered, adjudged, and decreed, that the plaintiff, Edward F. Palmer, was at the time of the commencement of the (F. M., D. C., S. C.) action and still was the lawful owner in fee simple absolute of the premises described in the complaint therein, and that the said defendant, The City and County of San Francisco, had not any estate, right, title, or interest therein, and that said defendant, The City and County of San Francisco,

be, and by said judgment was, forever thereafter enjoined, re-
33 strained, and debarred from asserting or claiming any estate, right, title, or interest in said premises or any part thereof.

And said judgment still remains in full force and effect, not reversed or otherwise vacated.

That on the 21st day of May, 1875, the said Edward F. Palmer executed and delivered to William Hollis a deed dated on that day by which he granted, bargained, and sold to said Hollis the tract of land conveyed to him as aforesaid by said Edward F. Tompkins, and which embraced and included all the lots of land described in the answers of the above-named defendants.

V.

That the defendants, Mark Levison, John Martens, Edward A. Bullis, E. M. Block, Jane N. Still, Catherine M. Henschen, Adolphe Weske, Elouise Weske, Charles F. Reed, John Hourcade, Virginia Hourcade, Samuel W. Latz, Mrs. L. A. Tracy, Richard I. Whelan, Elizabeth A. Vizard, Catalina de la Torre, Bertha Goldstone, Mary E. Shain, Jose Baptiste, James F. Brennan, Edward H. Brennan, Mary A. Brankin, Joseph Muller, Pierre Berges, Frank Garrissere, M. A. Whitney, Robert Hill, Jacob Goldstone, Manuel B. Silveira, John J. Maginnis, E. R. Folsom, Mary W. Folsom, John Berges, Thomas K. Noble, M. J. Rodrigue, F. W. Appiarius, Charlotte Ward, Nellie B. Fuller, Annie S. Band, John J. McKenzie, Mary J. Mc-
34 Kenzie, Minnie B. Hall, Edward Gilberts, Catherine Gilberts, Mary E. Talcott, Henrietta Hertz, Andrew J. Itsell, Aggie M. Itsell, Delia Carvill, John Elitch, Jr., Mary Elitch, Hugh J. Owen, Catherine Whelan, Jacob Jaggi, Wilhelmine Jaggi, Patrick A. Mahoney, Frederick Brown, Laura W. Lockwood, Jeremiah J. Donovan, W. D. Walsh, Jennie Lord, Albert Gunther, Stephen Macumber, Annie Macumber, Annie M. M. Wiessenhassen, Manuel F. Frietas, Harriet A. Carroll, John Kelly, G. Gerardi, L. Gottig, Hannah Cohn, Toldevar Peterson, David Meyers, Katherina Zinnen, James Garrod, and James O'Brien, have, respectively, by mesne conveyances from said William Hollis, subsequent to said May 21, 1875, acquired the title of said Hollis to the lots of land described in their respective answers, and are by themselves and their tenants, respectively, in the occupation of the lots described in their respective answers, but none of said last-named defendants are or were at the commencement of this action in the occupation of any part of the premises in controversy, except such as is specifically described in their respective answers.

That the said city and county of San Francisco has every year since and including the year 1872–'3 assessed and taxed for State, county, and municipal purposes, to the defendants last above named and their grantors, the lots of land described in their respective answers, and also the improvements thereon, and said defend-
35 ants and their grantors have each year paid all the taxes so assessed and levied on said lot.

That the plaintiff in this action has no other or different title or claim of title to the premises in controversy than it had at the time of the commencement of said action of Edward F. Palmer.

VI.

That the defendants, Charles Lagomarsino, Catherine Ennis, Fred, Martens, Charles Meyer, George Ludwig, Frank Morten, Frank Bishop, George C. Dawson, Adriano Fredriano, John N. McVeigh, J. H. S. Helms, C. W. Parker, J. E. Shain, Grace Shain, W. H. Wells, M. A. Wells, David Wolf, Mrs. M. T. Wolf, Maurice Van Lavenfels, W. L. Odell, Jane Beatus, —— Bachman, A. Grosset, Robert F. O'Neill, John D. Broder, Mrs. L. Moss, John G. Bloomer, Augusta Bloomer, Wm. J. Kramer, Mrs. W. J. Kramer, William Burke, Mrs. William Burke, A. D. Pratt, Mary Pratt, Flora Howe, Mrs. James Crawford, —— Rogers. and Johnathan Newcomb, Jr., were at the commencement of this action in the occupation of certain portions of the premises described in said deed from the city to Palmer as tenants of the other defendants hereinbefore named, as is admitted by said answers, but none of the said defendants herein named are or were at the commencement of this action in the occupation of any part of the premises in controversy, except such as are specifically described in their respective answers.

36 VII.

That the defendants, John Wolters, Alfred H. Cables, Charles W. Still, Henry Bischopp, Henry C. Carter, Rudolph Ohe, Albert Ohe, B. Walsh, Mrs. Charles F. Reed, Meyer A. Cohn, M. A. Bourne, Wm. M. Cornwall, Mrs. Wm. M. Cornwall, Henry Wredan, Fredericka Appiarius, H. F. Band, Michael Crotty, John A. Bagnall, Louis Talcott, H. Kohlberg, Joseph Meyerfelt, Orrin S. Carvill, Daniel P. Whelan, Albert McNee, Anna Maria Donovan, Mrs. W. D. Walsh, J. S. Mitchell, William Schmidt, Oliver C. Carroll, Johnathan Newcomb, Sr., Mrs. J. Newcomb, Sr., Sophie Peterson, W. A. Robertson, Joseph Zinnen, Mrs. James Garrod, Mrs. James O'Brien, The German Savings and Loan Society, The San Francisco Savings Union, The Societe Francaise d'Epargnes et de Prevoyance Mutuelle, and The Hibernia Savings and Loan Society, are not and were not at the commencement of this action in the occupation or possession of the premises described in the complaint or any part thereof.

And as conclusions of law from the facts above found the court finds that the plaintiff should take nothing as against the aforesaid defendants, and that the said defendants named in article 5 hereof are entitled to judgment against the plaintiff and in their favor respectively for the premises respectively described in the
37 several answers of said defendants, and that said defendants first herein named are entitled to have and recover their

costs herein expended, and it is ordered that judgment be entered accordingly.

Dated October 19, 1887.

F. W. LAWLER, *Judge.*

Filed Oct. 18, '87.

WM. J. RUDDICK, *Clerk,*
By A. J. RAISCH,
*Deputy Clerk.*

(Title of court and cause.)

*Judgment.*

This cause came on to be tried on the 5th day of September, 1887, before the court without a jury, a trial by jury having been waived by the parties, and was tried upon the issues raised by the complaint and the answers of the defendants, Mark Levison, John Martens, Charles Lagormorsino, Catherine Ennis, Fred. Martens, Charles Meyer, Geo. Ludwig, John Wolters, Edward A. Bullis, Alfred H. Cables, E. M. Block, Frank Morton, Jane N. Still, Charles W. Still, Catherine M. Henschen, Frank Bishop, George C. Dawson, Henry Bischopp, Henry C. Carter, Rudolphe Ohe, Albert Ohe, B. Walsh, Adolph Weske, Elouise Weske, Charles F. Reed, Mrs. Charles F. Reed, John Hourcade, Virginia Hourcade, Adriano Fredriano, Samuel W. Latz, Meyer A. Cohn, Mrs. L. A. Tracy, M. A. Bourne, Richard I. Whelan, John N. McVeigh,
38 Elizabeth Vizard, J. H. S. Helms, C. W. Parker, Catilina de la Torre, Bertha Goldstone, Mary E. Shain, J. E. Shain, Grace Shain, Jose Baptista, James F. Brennan, Edward H. Brennan, Mary A. Brankin, W. H. Wells, M. A. Wells, Jos. Muller, David Wolf, Mrs. M. T. Wolf, Pierre Berges, Frank Garrissere, Maurice Van Lavenfels, W. L. Odell, M. A. Whitney, Robert Hill, Jacob Goldstone, Jane Beatus, Manuel Silveira, John J. Magimnis, E. R. Folsom, Mary W. Folsom, John Berges, —— Bachman, A. Grosset, Thos. K. Noble, Robert F. O'Neill, Wm. M. Cornwall, Mrs. W. M. Cornwall, M. J. Rodrigue, F. W. Appiarius, Henry Wredan, Frederica Appiarius, Charlotte Ward, Nellie B. Fuller, Annie S. Band, H. F. Band, Michael Crotty, John McKenzie, Mary J. McKenzie, John D. Broder, Minnie B. Hall, Mrs. L. Moss, Edward Gilberts, Catherine Gilberts, John A. Bagnall, Geo. A. Knight, Mary E. Talcott, Louis Talcott (F. M., D. C., S. C.), Henrietta Hertz, H. Kohlberg (served as H. Golby), Andrew J. Itsell, Aggie M. Itsell, Delia Carvill, Orrin S. Carvill, John Elitch, Jr., Mary Elitch, Hugh J. Owen, Catherine Whelan, John J. Bloomer, Augusta Bloomer (F. M., D. C., S. C.), Daniel P. Whelan, Jacob Jaggi, Wilhelmine Jaggi, Patrick A. Mahoney, Frederick Brown, Albert McNee, Laura W. Lockwood, W. J. Kramer, Mrs. W. J. Kramer, Jeremiah J. Donovan, Annie M. Donovan (served as Mrs. J. J. Donovan), William D. Walsh, Mrs. W. D. Walsh, Jennie Lord, J. S. Mitchell, Albert Gunther, Stephen Macumber,
39 Annie Macumber, William Burke, Mrs. William Burke, A. D. Pratt, Mary Pratt, Anna M. M. Wiesenhassen, Manuel F. Frietas, William Schmidt, Harriet A. Carroll, Oliver C. Carroll, John

Kelly, G. Gerardi, L. Gottig, Flora Howe, Mrs. Jas. Crawford, —— Rodgers, Hannah Cohn, Johnathan Newcomb, Jr., Johnathan Newcomb, Sr., Mrs. J. Newcomb, Jr., Toldevar Peterson, Sophie Peterson, David Meyers, W. A. Roberts, Katherine Zinnen, Joseph Zinnen, James Garrod, Mrs. James Garrod, James O'Brien, Mrs. James O'Brien, The German Savings and Loan Society, The San Francisco Savings Union, The Societe Francaise d'Epargnes et de Prevoyance Mutuelle, and The Hibernia Savings and Loan Society, Messrs. Flournoy & Mhoon appearing as counsel for plaintiff and William & George Leviston, Thos. D. Riordan, Jarboe, Harrison & Goodfellow, H. A. Powell, and H. Loughborough, and Thomas F. Barry for the defendants.

After hearing the testimony and the argument of counsel the case was submitted to the court for consideration and decision, and after due deliberation thereon the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore by reason of the law and of the finding aforesaid it is ordered, adjudged, and decreed that the plaintiff do take nothing by this action as against the defendants above named or any of
40 them, and that the defendants, Mark Levison, John Martens, Edward A. Bullis, E. M. Block, Jane N. Still, Catherine N. Henschen, Adolph Weske, Elouise Weske, Charles F. Reed, John Hourcade, Virginia Hourcade, Samuel W. Latz, Mrs. L. A. Tracy, Richard I. Whelan, Elizabeth A. Vizard, Catalina de la Torre, Bertah Goldstone, Mary E. Shain, Jose Baptista, James F. Brennan, Mary A. Brankin, Joseph Muller, Pierre Berges, Frank Garrissere, M. A. Whitney, Robert Hill, Jacob (F. M., D. C., S. C) Goldstone, Manuel B. Silviera, John J. Maginnis, E. R. Folsom, Mary W. Folsom, John Berges, Thomas K. Noble, M. J. Rodrigue, F. W. Appiarius, Charlotte Ward, Nellie B. Fuller, Annie S. Band, John J. McKenzie and Mary J. McKenzie, Minnie B. Hall, Edward Gilberts, Catherine Gilberts, Mary E. Talcott, Henrietta Hertz, Andrew J. Itsell, Aggie M. Itsell, Delia Carvill, John Elitch, Jr., Mary Elitch, Hugh J. Owen, Catherine Whelan, Jacob Jaggi, Wilhelmine Jaggi, Patrick A. Mahoney, Frederick Brown, Laura W. Lockwood, Jeremiah J. Donovan, W. D. Walsh, Jennie Lord, Albert Gunther, Stephen Macumber, Annie Macumber, Anna M. M. Wiesenhassen, Manuel F. Frietas, Harriet A. Carroll, John Kelly, G. Gerardi, L. Gottig, Hannah Cohn, Toldevar Peterson (F. M., D. C., S. C.), David Meyers, Catherine Zinnen, James Garrod, and James O'Brien, have judgment against the said plaintiff and in their favor, respectively, for the premises, respectively (F. M., D. C., S. C.), described in the
41 several answers of said last-named defendants; and also that the defendants first above named do have and recover their costs incurred herein, to wit, the defendant, John Martens, the sum of $32.

Recorded Oct. 28, 1887, Book 3, J. (F. M., D. C., S. C.), page 484, D. S.

(Title of court and cause.)

*Notice of Appeal.*

To Wm. & Geo. Leviston, Thos. D. Riordan, Geo. A. Knight, Jarboe, Harrison & Goodfellow, P. F. Dunne, A. H. Loughborough, H. A. Powell, Tobin & Tobin, Stanley, Stoney & Hayes, H. C. Campbell, Thos. F. Barry, attorneys for defendants.

GENTLEMEN: You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California from the judgment therein made and entered in said superior court on the 28th day of October, 1887, in favor of defendants in said action and against said plaintiff and from the whole thereof.

Respectfully, FLOURNOY & MHOON,
*Att'ys for Plaintiff.*

Dated this 4th day of October, 1888.

42 Service of a copy of the within notice of appeal admitted this 4th day of October, 1888.

WM. & GEO. LEVISTON,
THOS. D. RIORDAN,
*Att'ys for Certain Defendants.*
A. H. LOUGHBOROUGH,
*Att'y for Certain Defendants.*
H. C. CAMPBELL,
*Att'y for The San Francisco Savings Union et als.*
JARBOE, HARRISON & GOODFELLOW,
*Att'ys for Certain Defendants.*
GEO. A. KNIGHT,
*Att'y for Nellie D. Fuller and in Pro. Per.*
P. F. DUNNE, *Att'y for Certain Defendants.*
THOS. F. BARRY,
By J. B. REINSTEIN, *Att'y for Certain Defendants.*
H. A. POWELL, *Att'y for Certain Defendants.*
TOBIN & TOBIN,
*Att'ys for Hibernia Savings and Loan Society.*
STANLEY, STONEY & HAYES,
*Att'ys for Certain Defendants.*

Endorsed: Filed Oct. 15, 1888. Wm. J. Ruddick, clerk, by J. J. Grief, deputy clerk.

43 (Title of court and cause.)

*Stipulation.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

The undersigned, attorneys for the appellant and respondents, hereby certify that the foregoing are full, true, and correct copies of

the original papers on file and of record in the office of the county clerk of the city and county of San Francisco, State of California, in this cause; that the foregoing constitutes the transcript on appeal from the judgments and orders hereinbefore mentioned.

——— ———,
*Attorneys for Appellant.*

——— ———,
*Attorneys for Respondents.*

44 (Title of court and cause.)

*Certificate of Clerk.*

I, W. J. Ruddick, clerk of the aforesaid superior court, do hereby certify that the foregoing judgment-roll and notice of appeal are true, full, and correct copies of their respective originals on file in my office in the above-entitled cause, and that the same constitute the transcript on appeal of the plaintiff, The City and County of San Francisco, to the supreme court of the State of California, from the final judgment made and entered in said cause on the 28th day of October, 1887.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court this 12 day of November, 1888.

WM. J. RUDDICK, *Clerk*,
[SEAL.] By E. J. CASEY, *Deputy Clerk*.

45 Service of a copy of the within transcript admitted this 27th day of November, 1888.

WM. & GEO. LEVISTON AND
THOS D. RIORDAN, *Att'ys for Certain Def't-*.
A. H. LOUGHBOROUGH,
*Att'y for D'f't, M. T. Rodrigue.*
THOS. T. BARRY,
By J. P. ROSENSTEIN, *Att'y for Certain Def'ts.*
H. A. POWELL, *Att'y for H. Z. Owen.*
P. P. DUNNE, *Att'y for Def't Elitch.*
GEO. A. KNIGHT,
*Att'y for Nellie B. Fuller and in Pro. Per.*
JARBOE, HARRISON & GOODFELLOW,
*Att'ys for Certain Def'ts.*
H. C. CAMPBELL,
Per LETCHER, *Att'y for Certain Def'ts.*
TOBIN & TOBIN, *Att'ys for Certain Def'ts.*
STANLEY, STONEY & HAYES,
*Att'ys for Certain Defendants.*

46 *Submission of Cause.*

1889.
January 22. Ordered that appellant be allowed 30 days within which to file brief; respondent 20 days to answer; appellant 10 days within which to reply; cause to be thereon submitted.

Feb. 21. Pursuant to stipulation, appellant allowed 20 day- further time to file brief.
M'ch 13. Filed appellant's brief.
Apr. 2. " respondents' brief.
" 15. Ordered that cause stand submitted.
The COURT.
May 13. Filed respondents' brief.
" 22. " appellant's brief in reply.

47 *Judgment.*

In the Supreme Court of the State of California.

THE CITY AND COUNTY OF SAN FRANCISCO, Appellant, *vs.* ANDREW J. ITSELL *et als.*, Respondents. } No. 12952. In Bank.

On appeal from the superior court in and for the city and county of San Francisco.

OCTOBER 1st, 1889.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court. Thornton, J., took no part in the decision.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, affirmed.

[Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—; paid by appellant, $—; paid by respondents, $—; total, $—. —— ——, clerk, by —— ——, deputy.

48 *Opinion.*

In Bank.

(Filed August 1, 1889.)

CITY AND COUNTY OF SAN FRANCISCO, Appellant, *vs.* ITSELL *et al.*, Respondents. } No. 12952.

This was an action of ejectment brought by the city against numerous defendants for a tract of land known as Hamilton square. As to a number of the defendants it was found that they "are not and were not at the commencement of this action in the occupation or possession of the premises described in the complaint or any part thereof." No question is made as to the correctness of the judgment in favor of these defendants. Judgment passed in favor of the other defendants upon two grounds, which are set forth

in the findings. The plaintiff does not bring up any of the evidence, but contends that the judgment should be reversed upon the findings.

1. In July, 1869, a compromise was agreed upon between the city and one Edward Tompkins, who claimed a tract including the premises in controversy. By this compromise the officers of the city, under an ordinance of the board of supervisors, executed to Tompkins a conveyance of the premises in controversy, and in consideration thereof Tompkins conveyed to the city the other portion of the tract claimed by him. The ordinance and deeds were subsequently ratified by act of the Legislature. The defendants claim through Tompkins.

We think that this defense cannot be sustained. The city held the square in trust for the public and had no power to dispose of it by way of compromise or in any other manner, nor could the Legislature sanction such a disposition of the trust property. This was held in Hoadley *vs.* San Francisco (50 Cal., 275), in which the court said: "The title was granted to the city in trust for public use, and the city had no authority, by virtue either of the statute of March 11, 1858, or of the act of Congress of July 1, 1864, to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use and is held for that purpose only. It cannot be conveyed to private persons and is effectually withdrawn from commerce, and, the city having no authority to convey the title, private persons are virtually precluded from acquiring it." This case was approved and followed in Sawyer *vs.* San Francisco (50 Cal., 375) and in Hoadley *vs.* San Francisco (70 Cal., 324), which was affirmed by the Supreme Court of the United States upon writ of error. (124 U. S., 646.) The rule, therefore, that the city holds property like this in trust and cannot convey it must be considered as settled.

2. The defendants, however, pleaded, and proved a judgment brought by their predecessor in interest against the city, and rely upon such judgment as a bar to the action; and this position must be sustained. It appears that Tompkins conveyed to one Edward F. Palmer and it is found that on September 11, 1869, Palmer commenced an action against the city in the late fifteenth district court to quiet his title; that the city appeared and contested said action and that the issue was whether Palmer or the city had the title; that this issue was determined in favor of Palmer, and that judgment was thereupon entered, by which it was "ordered, adjudged, and decreed that the plaintiff, Edward F. Palmer, was at the commencement of said action and still was the lawful owner in fee simple absolute of the premises described in the complaint therein, and that the said defendant, The City and County of San Francisco, had not any estate, right, title, or interest therein, and that said defendant, The City and County of San Francisco, be, and by said judgment was, forever thereafter enjoined, restrained, and debarred from asserting or claiming any estate, right, title, or interest in said premises or any part thereof." It does not appear whether any appeal was taken from this judgment, but it is found that it

"still remains in full force and effect, not reversed or otherwise vacated," and that the city "has no other or different title or claim of title to the premises in controversy than it had at the time of the commencement of said action of Edward F. Palmer." The defendants are successors in interest of Palmer.

Upon these findings we think it clear that the Palmer judgment is a bar to the action.

This precise question was decided in Holladay *vs.* San Francisco (76 Cal., 18), and that decision is conclusive of this branch of the case.

3. It is argued for the appellant, however, that the answers of the defendants herein were required to be verified, and, not having been so, should be disregarded. But, in the first place, the answers were not required to be verified. The only statute to which counsel for the city refer in support of their position is section 446 of the Code of Civil Procedure, which provides, among other things, that the answer must be verified "when the complaint is verified or when the State or any officer of the State, in his official capacity, is plaintiff." The complaint was not verified and the city is not the State or an officer thereof. The case of Stockton *vs.* Dahl (66 Cal., 378) is not in point. In that case there was a statute which expressly required the answer to be verified.

In the second place, it appears from the findings that the case "was tried upon the issues raised by the complainant and the answers of the defendants" (specifying them), and the plaintiff cannot go to trial without objection for the want of a verification and raise the point for the first time after the decision has gone against him. (See Arrington *vs.* Tupper, 10 Cal., 465; McCullough *vs.* Clark, 41 Cal., 302.)

We therefore advise that the judgment be affirmed.

HAYNE, *C.*

We concur.

FOOTE, *C.*

GIBSON, *C.*

The COURT: For the reasons given in the foregoing opinion the judgment is affirmed. Thornton, J., took no part in the decision of the above cause.

49 *Bond.*

In the Supreme Court of the United States.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff in Error,
*vs.*
ANDREW J. ITSELL *et als.*, Defendants in Error.

Know all men by these presents that we, Edward B. Bond and Isador Gutte, are held and firmly bound unto the United States of America and to the defendants in error herein and to each of them in the full and just sum of one thousand dollars, lawful money of the United States of America, to be paid to the said United States of

America and the said defendants in error and each of them and their certain attorney, attorneys, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

50 Whereas lately in a suit depending in the supreme court of the State of California between the City and County of San Francisco and Andrew J. Itsell and others a final judgment was rendered against the said City and County of San Francisco; and the said City and County of San Francisco having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued, directed to the said Andrew J. Itsell and other defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October, 1889:

Now, the condition of the above obligation is such that if the said City and County of San Francisco shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in

51 full force and virtue.

E. B. BOND. [SEAL.]
ISADOR GUTTE. [SEAL.]

UNITED STATES OF AMERICA, } ss:
*State of California, City and County of San Francisco,* }

Edward B. Bond and Isador Gutte, being duly sworn, depose and say and each for himself says that he is worth one thousand dollars over and above all just debts, liabilities, and exemptions.

E. B. BOND.
ISADOR GUTTE.

Sworn to this 11th day of October, 1889, before me—

W. H. BEATTY,
*Chief Justice.*

The within bond and the sureties thereto are approved.

W. H. BEATTY, *C. J.*

Endorsed: In the Supreme Court of the United States. The City and County of San Francisco *vs.* Andrew J. Itsell *et als.* Bond on writ of error. Filed Oct. 12, 1889. I. D. Spencer, clerk, by Frank Myers, deputy.

52 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Andrew J. Itsell and F. W. Appiarius, G. Gerardi, John J. Maginnis, J. Baptista, Bertha Goldstone, Frank Morton, E. M. Block, Albert Gunther, Thos. K. Noble, Edward A. Bullis, J. H. S. Helms, Robert F. O'Neill, John D. Berges, Virginia Hourcade, Hugh J. Owen, —— Bachman, John Hourcade, Jas. O'Brien, Augusta Bloomer, Henrietta Hertz, W. L. Odell, Jas. F. Brennan, Robert R. Hill, C. W. Parker, Jane Beatus, Minnie B. Hall, A. D. Pratt, Wm. Burke, Hibernia Savings and Loan Society, Mary Pratt, Taldemar Peterson, John G. Bloomer, Florence Howe, Michael J. Rodrigue, Mary A. Brankin, Catherine M. Henschen, Charles F. Reed, Fred. Brown, Jacob Jaggi, Mary E. Shain, Annie S. Band, Wilhelmine Jaggi, Jos. E. Shain, Pierre Berges, Geo. A. Knight, Grace Shain. Frank Bishop, John Kelly, Jane N. Still, Delia Carvill, Samuel W. Latz, Manuel B. Silviera, Harriet A. Carroll, Charles Lagomarisino, Mrs. L. A. Tracy, Mrs. Jas. Crawford, Laura Lockwood, M. E. Talcott, Mary Cohn, Geo. Ludwig, —— de La Torre, Jere. J. Donovan, Mark Levison, M. Van Lavenfels, Geo. C. Dawson,
53 John Martens, Mrs. E. A. Vizard, John and Mary Elitch, John McVeigh, David Wolf, E. R. Folsom, Charles Meyer, W. H. Wells, Mary W. Folsom, Fred. Martens, M. A. Wells, Adriano Frediano, Pat. A. Mahoney, Mrs. M. T. Wolf, Manuel B. Frietas, Jos. Miller, Annie M. M. Weisenhaven, Nellie B. Fuller, S. L. Macumber, Wm. D. Walsh, Edward Gilberts, Mrs. S. L. Macumber, R. I. Whelan, Catherine Gilberts, David Meyers, A. Weske, A. Grosset, Mrs. L. Moss, M. W. Whitney, L. Gottig, Joseph Miller, Elouisa Weske, Frank Gavussere, Mary J. McKenzie, Catherine Whelan, James Garrod, John McKenzie, Katherine Zinnen, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 14th day of October, A. D. 1889, pursuant to a writ filed in the clerk's office and directed to the supreme court of the State of Calfornia from the Supreme Court of the United States, in the action of the city and county of San Francisco against Andrew J. Itsell *et al.*, wherein the
54 said City and County of San Francisco is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and decree in the said action mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

W. H. BEATTY,
*Chief Justice Supreme Court of California.*

This tenth day of October, A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

Due service of the within citation admitted this eleventh day of October, A. D. 1889.

THOS. D. RIORDAN,
WM. & GEO. LEVISTON,
*Attorneys for Certain Def'ts.*
A. H. LOUGHBOUROUGH,
*Att'y for Def't Rodrigues.*
P. P. DUNNE, *Att'y for Def't Elitch.*
TOBIN & TOBIN AND THOS. F. BARRY,
*Attorneys for Certain Defendants.*
GEO. A. KNIGHT, *Pro. Persona.*
GEO. A. KNIGHT, *Att'y for Nellie B. Fuller.*
JARBOE, HARRISON & GOODFELLOW,
*Att'ys for Certain Defendants.*
55 H. C. CAMPBELL,
*Attorney for Certain Defendants.*
H. A. POWELL, *Att'y for Certain Defendants.*
STANLEY, STONEY & HAYES,
*Att'ys for Certain Defendants.*

Endorsed: In the Supreme Court of the United States. The City and County of San Francisco *vs.* Andrew J. Itsell *et als.* Citation.
Endorsed: Filed Oct. 12th, 1889. J. D. Spencer, clerk, by Frank Myers, deputy.

56 *Complaint & Petition.*

In the Supreme Court of the United States.

THE CITY AND COUNTY OF SAN FRANCISCO, Plaintiff in Error,
*vs.*
ANDREW J. ITSELL *et als.*, Defendants in Error.

To the Honorable W. H. Beatty, chief justice of the State of California:

Now comes your complainant and petitioner and for cause of complaint shows—

That on the 1st day of August, A. D. 1889, the honorable the supreme court of the State of California, being the highest court in said State, rendered a final judgment and decree in the above-entitled suit.

That in said suit there was drawn in question the validity of a statute of the United States, to wit, an act entitled (chap. CXCIV) "An act to expedite the settlement of titles to lands in the State of California," passed July 1st, 1864, and the authority exercised by said city and county of San Francisco under said statute of the
57 United States, and that said decision is against their validity.

That the said decision, judgment, and decree are against

the validity of the said statute, in this, that the said statute vested in said city and county of San Francisco an irrevocable trust and inalienable title in the lands and premises described in the complaint in this action for a public use, and that the decision, judgment, and decree wholly destroy said trust and alienate said lands.

That by and under said statute the said city and county holds and claims its title to the said lands and premises, its right to use the same for a public use, and the privelege of its enjoyment, and that said judgment, decree, and decision is against said title, right, and privilege.

Wherefore your complainant and petitioner prays that a writ of error issue out of the Supreme Court of the United States to
58 the supreme court of the State of California, and that the same be allowed by the honorable the chief justice of said last-mentioned court.

Dated October 10th, 1889.

GEO. FLOURNOY,
*City and County Attorney, Attorney for Plaintiff in Error.*

JOHN B. MHOON,
JOHN L. LOVE,
*Of Counsel.*

Endorsed: In the Supreme Court of the United States. The City and County of San Francisco *vs.* Andrew J. Itsell *et als.* Complaint and petition.

Endorsed: Filed Oct. 12th, 1889. J. D. Spencer, clerk, by Frank Myers, deputy.

59 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City and County of San Francisco and Andrew J. Itsell and F. W. Appiarius, J. Baptista, E. M. Block, Edward A. Bullis, John D. Berges, —— Bachman, Augusta Bloomer, Jas. F. Brennan, Jane Beatus, Wm. Burke, Mrs. Wm. Burke, John G. Bloomer, Mary A. Brankin, Fred. Brown, Annie S. Band, Pierre Berges, Frank Bishop, Delia Carvill, Harriet A. Carroll, Mrs. Jas. Crawford, Mary Cohn, Jere. J. Donovan, George C. Dawson, John and Mary Elitch, E. R. Foisom, Mary W. Folsom, Adriano Frediano, Manuel B. Frietas, Nellie B. Fuller, Edward Gilberts, Catherine Gilberts, A. Grosset, L. Gottig, Frank Garrissere, James Garrod, G. Gerardi, Bertha Goldstone, Albert Gunther, J. H. S. Helms, Virginia Hourcade, John Hourcade, Henrietta Hertz, Robert R. Hill, Minnie B. Hall, Hibernia Savings and Loan Society, Flowerence Howe, Catherine M. Henschen,

Jacob Jaggi, Wilhelmine Jaggi, Geo. A. Knight, John Kelly, Samuel W. Latz, Charles Lagomarisino, Laura Lockwood, Geo. Ludwig, Mark Levison, John Martens, John McVeigh, Charles Meyer, Fred. Martens, Pat. A. Mahoney, Jos. Miller, S. L. Macumber, Mrs. S. L. Macumber, David Meyers, Mrs. L. Moss, Joseph Muller, Mary J. McKenzie, John McKenzie, John J. Maginnis, Frank Morton, Thos. K. Noble, Robert F. O'Neill, Hugh J. Owen, Jas. O'Brien, W. L. Odell, C. W. Parker, A. D. Pratt, Mary Pratt, Taldemar Peterson, Michael J. Rodrigus, Charles F. Reed, Mary E. Shain, Jos. E. Shain, Grace Shain, Jane N. Still, Manuel B. Silveira, Mrs. L. A. Tracy, M. E. Talcott, —— de la Torre, M. Van Lavenfels, Mrs. E. A. Vizard, David Wolf, W. H. Wells, M. A. Wells, Mrs. M. T. Wolf, Annie M. M. Weisenhaven, Wm. D. Walsh, R. I. Whelan, A. Weske, M. W. Whitney, Elouisa Weske, Catherine Whelan, Katherine Zinnen, wherein was drawn in question the validity of a
60 statute of the United States and an authority exercised under the United States and the decision was against its validity, a manifest error hath happened, to the great damage of the said city and county of San Francisco, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., before our Supreme Court of the United States on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, that the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this tenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
*Clerk U. S. Circuit Court, Northern District of California.*

The above writ of error is hereby allowed.
W. H. BEATTY,
*Chief Justice Supreme Court of California.*

61 [Endorsed:] No. 12952. In the Supreme Court of the United States. The City and County of San Francisco *vs.* Andrew J. Itsell *et als.* Writ of error. George Flournoy, attorney for pl'ff in error. John B. Mhoon, John L. Love, of counsel. Filed Oct. 12, 1889. J. D. Spencer, clerk, by F. Myers, dep.

62 In the Supreme Court of the State of California.

CITY AND COUNTY OF SAN FRANCISCO, Plaintiff in Error,
*vs.*
ANDREW J. ITSELL *et als.*, Defendants in Error.

I, J. D. Spencer, clerk of the supreme court, State of California, do hereby certify that the foregoing fifty-eight pages, numbered from one to fifty-eight, both number- inclusive, contain a true and correct transcript, in the cause above entitled, of all papers necessary to return to annexed writ of error.

Witness my hand and the seal of the said supreme court this 15th day of October, A. D. 1889.

[Seal Supreme Court of California.]

J. D. SPENCER, *Clerk.*
By FRANK MYERS, *Deputy.*

[Endorsed:] No. —. In the supreme court, State of California. —— —— *vs.* —— ——.

Endorsed on cover: California supreme court. No. 1506. The City and County of San Francisco, plaintiff in error, *vs.* Andrew J. Itsell *et al.* Filed November 8, 1889.

# BRIEF OF PLAINTIFF IN ERROR.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1506.

THE CITY AND COUNTY OF SAN FRANCISCO,
PLAINTIFF IN ERROR,

*vs.*

ANDREW J. ITSELL ET AL*s*

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1506.

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THE CITY AND COUNTY OF SAN FRANCISCO, PLAINTIFF IN ERROR,

*vs.*

ANDREW J. ITSELL ET AL*S*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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## Brief of Plaintiff in Error.

### ABSTRACT STATEMENT.

This is an action of ejectment brought by the City and County of San Francisco, a municipal corporation, against the defendants to recover the property described in the complaint, and which is commonly known as part of "Hamiliton Square."

Not to go too far back, the title to this land was in Mexico. The government of Mexico embodied it in a Pueblo.

The United States succeeded to the title of the whole Pueblo, except in so far as it had been granted by Spanish Grants or Alcalde Grants.

The United States acquired title by conquest, by treaty and by purchase.

Now after the conquest, gold was discovered in this part of the world, and a city grew up upon this peninsula.

A State was carved out and San Francisco became a municipal corporation.

She, San Francisco then commenced to claim that she had succeeded to all the rights of the "Pueblo," and proceeded to parcel out the lands of the Pueblo to the persons in possession, while all the time the title was in the United States and not open to entry of any kind.

The city passed ordinances and made maps, and the Legislature of the State ratified them, but no one got any title of any kind or character known to the law until the Act of Congress passed July 1st, 1864.

At this time titles to land in San Francisco being in such an uncertain state, by reason of the decisions of the courts of both State and Federal Jurisdiction, Congress passed the Act of July 1st, 1864, and adopted the "Van Ness" map, as it was drawn, and gave everybody the ground he was in possession of on the 1st day of January, 1855, excepting the reservations made by the treaty, by the map and whatever the President might choose to reserve within one year thereafter. (Mr. Fillmore might have saved the government a million, if at that time he had reserved a site for a post-office).

Act of Congress, Chap. CXCIV An Act to Expedite the Settlement of Titles to Lands in the State of California, July 1st, 1864.

The only thing adopted by Congress was the Act of 1858, of the State of California, which expressly confirms the Acts of the commissioners and the common council and its plan and map as to public squares.

See Section 1, of the Act of March 11, 1858, top of page 56, Statutes of California 1858. See *addenda*.

The Act of Congress approved March 8th, 1866, entitled: "An Act to quiet the title to certain lands "within the corporate limits of the City of San Fran-"cisco" was the next enactment.

What does it do?

It confirms the decree of the Circuit Court of the United States for the Northern District of California, entered on the eighteenth day of May, 1865, * * * * subject, however, to the reservations and exceptions

designated in said decree, * * * * except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses.

The decree above referred to expressly deducted from the confirmation "such parcels of land as have been heretofore reserved or dedicated to public uses by the United States."

The Act of Congress was dated July 1st, 1864. The decree is dated May 18th, 1865, and then comes the Confirmatory Act of 1866, March 8th.

In this case certain people "squatted" on this square and subsequently undertook to make a title by compromise with the municipality by taking one-half. The city authorities passed an ordinance agreeable to this compromise, and the same was ratified by the Legislature of the State. Not satisfied with this, however, one Palmer, the then possessor brought suit against the city to quiet title, and a judgment at *nisi prius*, which was never appealed went against the city, and stands of record yet.

The only question involved is the validity of that judgment. Is it a bar?

And it arises in this manner:

*a.* The United States held the title in fee.

*b.* By Acts of Congress it vested this title in the City and County of San Francisco forever for a public use.

*c.* The Acts of Congress created a trust irrevocable and inalienable.

*d.* No one not claiming by a title superior to the United States had any right to litigate this title.

*e.* A trust created by Congress cannot be destroyed by the decree of a State Court.

The specifications of error relied on is the Court of last resort, holding that the judgment mentioned in the findings is a bar to this action.

See record, pages 13, 14 and 15, the findings and the opinion of the Court, page 22.

The point of law is that this judgment was not a bar, and did not bind any one or estop the city from at any time setting up title under the Acts of Congress.

## ARGUMENT.

Of course we cannot recover on the weakness of our adversaries title, but it is difficult to see if this judgment is sustained why the United States is not the owner of the land granted in trust, if the trust has been converted to uses foreign to the trust.

A judgment cannot be a bar against a municipal government holding property in trust for a public use for the people of the city, the State and the United States, which trust so far as San Francisco is concerned is irrevocable.

The United States acquired the Pueblo by conquest, treaty and purchase.

San Francisco had no title of any kind until the grant by Congress under the Act of July 1, 1864.

All of her ordinances, surveys and grants, and all of the Acts of the Legislature confirmatory thereof were gratuitous.

Neither governing body had anything to give. Both were dealing with a piece of land which they knew belonged to the United States, as is evidenced by the first and third sections of the Act of March 11, 1858, copying the words of Ordinance No. 822.

Section one makes it the duty of the Mayor to enter the lands at the proper land office of the United States. Section three provides that the patent or any grant made by the United States should inure to the benefit of the persons described in the act and the ordinance.

After all this viewing and parceling out of the land which did not belong to them, the authorties applied to Congress for a grant, and they got it—got it in accord with the Act of the Legislature of California of 1858, by the Act of Congress of July 1, 1864, (Sec. 5 of the Act) except that the President could reserve as much of the ground as he pleased, provided he exercised his election within one year.

He could have taken the whole of Hamilton Square as a barracks if he wanted it.

Congress was not bound by the map of the city commissioners. It could have ordered a new survey and made altogether new and different reservations both Municipal and Federal, but it chose to adopt the

Van Ness map, this particular dedication, and it made the dedication its own.

The plan and map was expressly confirmed as to public squares; Sec. 1, Act March 11, 1858, top of page 56. See Act of 1858, *addenda*.

The city has acquired this title in trust for a public use. It has no power over the estate except such as was given it by Congress. It cannot alienate it, for if it could it would destroy the very object of the grant. If it cannot sell it—if its title or holding is such that it cannot sell it, then it cannot be taken away by judgment. That which cannot be done by direction cannot be done by indirection. The city's tenure is an irrevocable trust, and the city and the land can only be absolved from it by an Act of Congress itself. The United States must necessarily forever have an interest in any trust it may create.

The Legislature of California even cannot authorize the city to divert the land from the use for which it was granted.

Congress granted the Yosemite Valley to California for a public use.

Can California sell it?

Can California by any means or in any way submit to a judgment that would divest the United States and the people of the title to that valley?

The Supreme Court of California (see record, page 22) in this case held that.

The city held the square in trust for the public, and could not dispose of it: that the compromise was of no effect—that the property was withdrawn from commerce, that the Legislature could not authorize its alienation, but it holds that there is a power, to-wit: a *nisi prius* court, which is greater than the municipality, greater than the Legislature and greater than Congress, and can do what the former cannot do and ~~mudo~~ undo what the latter has done. It will be observed, however, that the Court gives no reason, it merely says that the judgment is a bar and leaves it there.

I have added as an *addenda* to this brief the opinion of Mr. Justice Hoge *in extenso*. This case was recently decided in the Superior Court and involves the identi-

cal question at issue here. That is, the validity of a judgment against the city quieting the title of one claiming a possessory title to a public square, (Lafayette), and is this same case all over again, same title, same dedication, same character of judgment, except this is ejectment and the case quoted was to abate a nuisance which involved the title.

Respectfully submitted,

JOHN L. LOVE,
*Of Counsel.*

GEO. FLOURNOY,
City and County Attorney,
J. B. MHOON,
*Of Counsel.*

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*In the Superior Court of the City and County of San Francisco, State of California.*

THE PEOPLE OF THE STATE OF CALIFORNIA, ETC.,
*vs.*
S. W. HOLLADAY ET AL.

**Department No. 4.**

## Action to Abate Nuisances on Lafayette Park.

MOTION FOR NEW TRIAL—BEFORE HOGE, JUDGE.

This action is brought by the people of the State of California, by her Attorney-General against the defendants, to compel the removal of certain obstructions alleged to be nuisances, from a tract of land alleged to have been dedicated to public use, as a public square, by the name of "Lafayette Park," and so laid down on the official map of the City and County of San Francisco.

The answers of the defendants set up a variety of

defenses, and while admitting the erecting and maintaining of the buildings, and maintaining the obstructions complained of, deny that they are public nuisances, and while admitting that the lands in question were and are designated on the official map of the city as a public park, by the name of Lafayette Park, deny that the land was dedicated by the Act of 1858, referred to in the complaint, and deny that it is a public square. And for a further defense aver that the land in controversy is within and covered by the provisions of the ordinance of the city numbered 822, and within the limits of the Charter of 1851, and covered by the Act of 1858, and set up the possession and claim of defendants, and those under whom they claim, under the provisions of the ordinance.

In addition to these defenses, the defendants set up in bar of the present action, the judgment given in an action commenced by the Attorney-General in the name of the People at the relation of George T. Bohen, on the 16th of November, 1863, against Holladay *et al.*, and also a judgment rendered in an action commenced on the 17th of December, 1864, by the defendant Holladay against the City and County of San Francisco.

The complaint in that case averred that the plaintiff Holladay was the owner in fee simple absolute and in possession of certain described lands between Clay, Gough and Octavia streets, in the City and County of San Francisco, and that the city and county, the defendant, claims some title adverse to the plaintiff, which claim was false and groundless in law and was a cloud upon plaintiff's title, and prayed for judgment that defendant had no title, etc.

To this complaint, on the 30th of December, 1864, John Saunders, styling himself attorney for the defendant, filed an answer denying the allegations of the complaint.

On the issue thus made, the case came on for trial on the 27th of September, 1865, before Judge Sawyer, of the Fourth District Court, and on the 5th of September, 1867, findings and decree were rendered in favor of Holladay for nineteen-twentieths $(\frac{19}{20})$ and

for the city and county for one-twentieth ($\frac{1}{20}$) of the land, and that each party pay his own costs.

On these issues, the case was tried by my predecessor, Judge Maguire, and in December, 1888, findings and judgment were rendered by the Court in favor of the defendants and against the plaintiff. The case now comes before me on a motion for new trial made by the plaintiff, upon a statement settled by the Judge who tried the cause.

The Court found, among other things, that the land in dispute was in the City and County of San Francisco, west of Larkin street, and within the charter limits of 1851, and is laid down on the Van Ness Ordinance Map of the city as Lafayette Park, but so laid down without right or authority of the owners. That it was not dedicated on the 11th of March, 1858, or at any other time, to public use as a public square, or accepted as such, but was held adversely by defendants from 1854. That all the matters were *res adjudicata* in the judgments referred to in the pleadings.

And as conclusions of law, the Court holds that the land in dispute was not on the 11th of March, 1858, or ever, dedicated to any public use, but was the private property of the defendants free and clear from any dedication whatever, and that the matters alleged in the complaint are not nuisances at all. That the plaintiff's rights in the premises were no other or greater than existed at the commencement of the suit referred to in the pleadings, and in the findings, and thereupon rendered judgment for the defendants.

This is substantially the nature and character of the case as now presented to me on this motion. The case is certainly one of very great importance, and I have given it all the consideration my other duties would permit, and I now proceed to give my conclusions upon the case.

The nature and character of the title of the City of San Francisco to her lands have been so often the subject of consideration, both in our own Supreme Court and in the Supreme and Circuit Courts of the United States, as now to be deemed settled and to admit of no further question. The city, as the successor of the

pueblo, never had an indefeasible title in the lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. It was a right which the government might refuse to recognize at all, or might recognize in a qualified form. (See U. S. 98, 16; 6 Wallace, 373.)

The United States succeeded to the rights and authority of the former government, out of which the fee had not passed. Before any title could pass to the city in these lands, action was required on the part of the United States. That action has been taken by the United States in the Acts of Congress of 1864 and 1866. Until that action, the city held by its original imperfect title only; afterwards it was possessed only for the uses and purposes specified in the Van Ness Ordinance and the Acts of Congress of 1864 and 1866, and the decree of the Circuit Court of the U. S. of the 18th of May, 1865.

The defendants here claim title under that ordinance, No. 822, called the Van Ness Ordinance. The city could only grant by that ordinance such title as she was permitted by Congress and the State to convey.

The several ordinances of the city confirmed and ratified by the Act of the Legislature of March 11th, 1858, and the Acts of Congress of 1864 and 1866, dedicated to public use forever, among other property, the land in controversy here, as a public square or park, by the name of Lafayette Park. Such lands so dedicated could not lawfully be conveyed by the city to private parties.

The ordinance itself excepted the lands in question and devoted them to public use, and the State ratified and confirmed that disposition. In short, to use the language of the Supreme Court of the United States, in the Hoadley case, 124 U. S., 646, "the State refused "to confirm the ordinance, so far as it had reference "to the grant by the city of any part of these squares, "and Congress in its conveyance followed in this par- "ticular what had been done by the State." And in the same case, our Supreme Court, in 70 Cal., held that whatever rights the plaintiff acquired under the Van Ness Ordinance, he took subject to the Act of 1858,

which approved the survey and map of the city prepared under the provisions of the ordinance. The map of the squares, including four blocks each, was approved, ratified and confirmed by the Act, and takes validity from that Act and governed and controlled the rights of the plaintiff. The opinion and decision of our Supreme Court was affirmed and adopted in its entirety by the Supreme Court of the United States on the Appeal, 124 U. S. Those squares being thus dedicated by the ordinance, by the Act of the Legislature, and by the Acts of Congress, could not be made the subjects of private individual property. They are effectually withdrawn from commerce. No one can acquire title to them, or any part of them, by adverse possession, however long continued. The Statute of Limitations has no application to them; a street or square cannot be made the subject of adverse possession. The public can not be deprived of their use by any claim of possession. They are incapable of transfer or conveyance, and cannot be acquired by individuals. These principles have been repeatedly sustained by our Supreme Court, by the Supreme Court of the United States, and by courts generally.

The cases of Hoadley *vs.* San Francisco, in 50 and 70 California, Sawyer *vs.* San Francisco, 50th Cal., San Francisco *vs.* Sullivan, 50 Cal., 605, are conclusive of the status of these lands and of the rights of the city, and of the public in them. As the Court holds, they were granted to the city in trust for public uses, and the city had no authority to alienate, or in any manner dispose of them, but only to hold them for the purposes expressed in the statute; they were granted to the city for public use and are held for that purpose only; they cannot be conveyed to private persons, and are effectually withdrawn from commerce; and the city having no authority to convey the title, private persons are virtually precluded from acquiring it. The land itself, and not the use only, was dedicated to the public.

I cannot therefore agree with the learned judge who tried this case, or concur in his findings. All the testimony upon which the Supreme Court has repeatedly

held these squares to have been dedicated to public use were before him in this record, and I cannot understand how he could find that there was no dedication of the property in question to the public use; or how he could find that the defendants taking possession of parts of a public park devoted to public uses, obstructing it with fences and buildings, and avowing an intention to continue to do so, and claiming a right, as against the public, committed no nuisance, of which the public had any right to complain or abate.

Upon this record, therefore, I am clearly of opinion that the defendants have no title whatever to the premises in dispute, and that the plaintiff clearly proved a legal dedication of Lafayette Park and were entitled to the relief asked in their complaint. The dedication was complete by act of law and required no acceptance or use, and the right of the public to abate any nuisance upon the square was perfect.

If there were no other defense, the right of the plaintiff to a new trial would be undoubted. But the defendants have set up in bar of the plaintiffs' right, two judgments, and claim that in the cases in which those judgments were obtained, the rights of the plaintiff have been adjudicated adversely and in favor of the title of the defendants and are conclusive of this case and a bar to its prosecution.

The first of these judgments in order, as we have seen, was rendered in the case of the people on relation of Bohen against Holladay *et al.*, commenced on the 16th of November, 1863. This judgment the Court holds, adjudicated all the matters involved in the present action and is *res adjudicata*.

This case has been twice tried. First by Judge Hunt, who rendered findings and judgment in favor of the defendants, holding the judgment in question to be a bar. The case was carried to the Supreme Court by the plaintiffs, and a judgment rendered by the Supreme Court, reversing the judgment rendered by Judge Hunt, and holding the judgment not to be a bar, and the rights of the plaintiff to be unaffected by the judgment. That decision disposed of the judgment in question (68 Cal., 439) and is the law of the case and

it must therefore be dismissed from further consideration.

The whole defense then rests upon the other judgments referred to and set out in the pleadings. That judgment, as we have seen, was rendered in an action brought on the 17th of December, 1864, by the defendant Holladay, against the City and County of San Francisco, claiming to be the owner in fee simple of certain lands in the city, to which the city pretended to have some claim, and seeks to quiet his title as against the city. Upon that complaint and the answer denying its allegations, the action was tried and a judgment rendered in favor of the plaintiff for nineteen-twentieths of the premises, and one-twentieth to the city, as a tenant in common.

The question which now presents itself is whether or not this judgment is a bar to the prosecution of the present action, and conclusive of the rights of the people of the State as now presented on this record. The question thus presented is an important one, and I do not think has as yet been determined in the various cases which have received the consideration of the Supreme Court, with regard to the peculiar condition of the city with reference to her lands.

It will be observed that the present suit is instituted by the people of the State through the Attorney-General to remove and suppress certain alleged public nuisances, committed and maintained by the defendants upon a public park, devoted by law to public uses forever.

The contention is that the judgment rendered in a private suit brought by a private individual against the city and county is a bar, and defeats all right in the public to enforce the public right, and to protect the public parks of the city from public nuisances.

Is the proposition sound in principle and in law?

The premises in question here, as we have seen, are a part of a public park or square in the City of San Francisco, devoted by law to public uses.

That the parks of the city designated on its map and confirmed by law are so dedicated forever, is no longer an open question. The repeated decisions of our own

Supreme Court, and of the Supreme Court of the United States, have set the question of dedication forever at rest. The principles governing the right of the city to her streets are entirely applicable to her public squares and parks. They rest upon the same ground and are governed by the same principles. Those principles are well settled by all authorites. The city holds its streets, its squares and its parks for the use of the people of the city and of the State. It has no absolute title, no power of disposition, no power of sale, no power to divert the property from the uses and purposes to which it has been devoted by the State and the United States. If it attempted to convey it, or secure it to any individual, its acts would be void. By the dedication, these lands were withdrawn from commerce and cannot be made the subject of private property, nor can individuals acquire any right to them; it is inalienable. Mr. Justice McLean, in delivering the opinion of the Supreme Court of the United States, in the case of New Orleans *vs.* The United States, on page 712, 10 Peters, says "That property may be dedicated to public use is "a well established principle of the common law. It "is founded in public convenience and has been sanc- "tioned by the experience of ages. Indeed, without "such a principle, it would be difficult, if not impracti- "cable, for society in a state of advanced civilization "to enjoy those advantages which belong to its condi- "tion and which are essential to its accommodation " * * * It is not essential that this right of use "should be vested in a corporate body; it may exist in "the public, and have no other limitation than the "wants of the community at large." And then the Court refers to and reiterates the principle announced in two leading cases reported in 6 Peters—the case of Cincinnati *vs.* White and Barclay *et al. vs.* Howell. And in the Hoadley case, 24 U. S., 646, the Supreme Court say lands so dedicated could not lawfully be conveyed by the city to private parties, and that the Acts of Congress did not enure to the benefit of Hoadley.

Now if the city cannot convey, if private parties cannot acquire, if withdrawn from commerce, incapable

of adverse possession, free from the Statute of Limitations, and incapable of being reduced to private property, by what process of reasoning can a private judgment rendered in a case between defendant Holladay, and the City and County of San Francisco, to which the present plaintiff was no party, and her interests wholly unrepresented, be held to bar the public rights, destroy the dedication and reduce a public park of the city to private ownership?

Neither the city nor any attorney claiming to represent her, had any right or power to submit the rights of the state and the people to adjudication in that private suit, and above all, to submit the right and power of the government of the United States to attach any conditions to her grant to the city, and by the very grant itself to dedicate to the public use forever any portion or part of the granted premises, and to make the city her agent to hold and protect that grant for the use and purposes to which the government in her sovereign power may choose to devote it. The city and county is the mere agent of the State and of the United States to preserve, defend and protect the public property of the people of the State, and prevent its diversion to private uses. For these purposes alone, the city may or may not be invested with the title, or it may rest in the people. It cannot be questioned that in this case the city holds nothing but the naked title in trust for the people. The city cannot by action, or non-action of hers, endanger or destroy the public rights in this property withdrawn from commerce and devoted to public use.

Those rights and interests were not involved, nor in issue in the case in question, nor was any one authorized to submit them to adjudication.

The effect of a judgment upon pueblo lands of San Jose was elaborately considered in the case of Branham *vs.* The Mayor and Council of San Jose, 24 Cal., 585. That was the case of an attempted mortgage by the municipal authorities of certain of the pueblo lands, a foreclosure of the mortgage and sale of the mortgaged premises. The Court held the decree, sale and sheriff's deed void, and conveyed no title, and did not estop the

city from setting up its title to the lands. And an agreement by the city undertaking to confirm the title of the purchasers and releasing the city's title, was equally void.

And again, in the case of Hart *vs.* Burnett, 15 Cal., 580, it was held that judgments against the city and executions and sales upon such judgments were wholly without effect upon the interests of the city in her pueblo lands; and that, too, after many decisions sustaining such sales.

That case has been held law ever since its decision in 1860. And in the New Orleans case, already cited, grants and judgments were held not to deprive the city of the quays devoted to the public; and in the Hart case, the Supreme Court cites the Orleans case as holding that property may be dedicated to the public use without vesting the legal title, and that when such use had once been created it could be destroyed only by an exercise of the right of eminent domain.

The City of San Francisco, as successor of the pueblo, asserted her title to four square leagues of land and presented her claim to the Board of Land Commissioners created under the Act of 1851. The Board confirmed the claim to a portion of the land and rejected it for the balance. The city appealed from that decision to the District Court, and the case was transferred to the Circuit Court, and that Court on the 18th of May, 1865, entered its decree confirming the claim. From that decree, an appeal was taken to the Supreme Court, and whilst the case was pending there, Congress passed the Act of March 8th, 1866, to quiet the title to certain lands within the corporate limits of the City of San Francisco. By this Act, all the right and title of the United States to the lands within the corporate limits of the city, confirmed by the decree of the Circuit Court, were relinquished and granted to the city, and the claim confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon certain trusts as to the disposition of the land.

"By this Act," said the Supreme Court in Grisar *vs.* McDowell, "the government has expressed its precise "will with respect to the claim of the City of San Fran-

"cisco to her lands, as it was then recognized by the "Circuit Court of the United States. In the execu- "tion of its treaty obligations with respect to property "claimed under Mexican laws, the government may "adopt such modes of procedure as it may deem ex- "pedient. It may act directly by legislation upon the "claims preferred or it may provide a special Board "for their determination, or it may require their sub- "mission to the ordinary tribunals. It is the sole "judge of the propriety of the mode, and having the "plenary power of confirmation, it may annex any con- "ditions to the confirmation of a claim resting upon an "imperfect right, which it may choose. It may de- "clare the action of the special Board final; it may "make it subject to appeal; it may require the appeal "to go through one or more courts, and it may arrest "the action of the Board or Courts at any stage." Montgomery *vs.* Bevans, 1 Sawyer, 674–5; 6 Wallace, 378.

The Court in the Montgomery case then goes on and holds that the Act of 1866 withdrew the claim of the city from further consideration of the Courts; and says: "It disposed of the city claim, and determined the "conditions upon which it should be recognized and "confirmed. The title of the city, therefore, rests upon "the decree of the Circuit Court as modified by the "Act of Congress."

And Judge Field, in the case referred to, then says the title of the city is that which is recognized and established by the decree. "The decree must be read "precisely as if the conditions prescribed in the Act of "Congress had been inserted in the decree by the "Court."

And on page 683, Judge Field says: "It is evident "that the State Courts are incompetent to determine "finally upon the rights of parties claiming by imperfect "titles of Mexican or Spanish origin before their con- "firmation."

Now the Act of March 8th, 1866, granted and confirmed to the city and its successors all the lands within its corporate limits, confirmed by the decree of the Circuit Court, subject to the reservations and ex-

ceptions designated in said decree, and in trust to dispose of them in such quantities and on such terms and conditions as the Legislature may prescribe, except such parcels thereof as may be reserved and set apart by ordinance of said city for public uses.

In consequence of this act at the December term of the Supreme Court, 1866, following the passage of the Act, the appeals of the United States and of the city were both dismissed; and on p. 584, of 4 Sawyer, in the pueblo case, Judge Field again says: "The title of the City "of San Francisco therefore rests upon the above decree "of the Circuit Court, entered on the 18th of May, "1865, and the above confirmatory Act of Congress," and again refers to and cites the opinion of the Supreme Court of the United States in the case of Grisar *vs.* McDowell, reported in 6 Wallace.

Now it is perfectly obvious that the judgment in question rendered in an action brought in December, 1864, by the defendant Holladay, against the City of San Francisco, cannot be a bar, or in any way whatever affect the title of the city, or the rights of the people of the State, resting upon the decree of 1865, and the Act of Congress of March 8th, 1866, confirming the dedication of the land in question to the public use.

The city never had any more than an imperfect claim, subject to the entire control of the government, to do with it as it pleased, and to allow or disallow it, or annex any terms upon its allowance. No one could acquire title under or against her but subject to the final action of the government upon her claim.

This was never finally recognized and confirmed until the decree of 1865, the Act of 1866 and the dismissal of the appeals. Then, and then only the city, by the Acts in question became invested with the title in trust for the public, without the power of disposition. The Legislature itself could not divert or defeat this public use, except perhaps by the power of eminent domain.

I am satisfied that the judgment relied upon had no such effect. The controversy here seems to arise under the laws of the United States and the decree of the United States Courts, and the decision in question cannot control the matter. The Act of Congress operat-

ed upon the title as effectively as a patent would have done. As we have seen, the State Courts are incompetent to determine finally upon these imperfect titles of Mexican origin, and if the grant or claim is finally confirmed by the tribunals of the United States the judgment of the State Court would not be a bar to an action on the patent. Montgomery *vs.* Bevans, 1 Sawyer; 683.

Now in point of fact, in addition to the decree of the Circuit Court and the Act of Congress of 1866, the patent of the government to the City of San Francisco, dated June 20, 1884, was put in evidence at the trial of the case, by which the government granted to the City of San Francisco, its successors and assigns, and upon the trusts named and set forth in the decree of the Circuit Court and in accordance with the provisions of the said Act of Congress of March 8th, 1866, the land embraced and described in the foregoing survey. This was the final act of the government.

And in my judgment disposes of all questions connected with the judgment relied upon by the defendants.

But if I am mistaken in my views of this case thus far expressed, and even if the judgment relied upon should be held conclusive on the title to the premises in question, it would by no means follow from that concession that the present plaintiff can not therefore prosecute and maintain the present action for the suppression and removal of public nuisances committed by the defendants upon a public park dedicated by law to the public.

The public use thus established would be entirely unaffected by the question of title in whomever vested. The city held the title in trust for the use of the public. The property was indelibly stamped with the public use. No one could acquire the title from her by judgment or otherwise, free of public use. If the judgment in question is conclusive upon the title, the result would simply be that the defendants would hold the mere naked title, subject to and bound by the same trust, and could not take exclusive possession of the park, or commit any nuisance upon it, or interfere with the public enjoyment of the park; and the right of the pub-

lic to remove such nuisances and preserve the park free for the people's enjoyment, notwithstanding the judgment, and notwithstanding the naked title might be in the defendants, would be perfect. That title would necessarily be subject to the dedication and the public rights. A judgment against a trustee is no bar to the rights of the beneficiaries. The use is an entirely distinct thing from the title. The title may be in one and the use in another. The ownership of property may be in the public and the use private; or on the other hand, the ownership may be private and the use public. Both by the civil and common law, dedication of land to public uses is an estoppel of all subsequent claim to it; wherever the title goes, the use remains unaffected. It does not require title to maintain the use. Property may be dedicated to public use without vesting the legal title. As we have seen in the New Orleans case cited, the right of use may exist in the public and have no other limitation than the wants of the community at large.

And in the same case it is said that the public places, such as roads and streets, cannot be appropriated to private uses, is one of those principles of public law which required not the support of much argument. Nor is there any doubt, that if, by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void. And the court held that there can be no difference in principle between ground dedicated as a quay to public use, and the streets and alleys of a town; and as to the streets, it may be asked, whether the king could rightfully have granted them. This will not be pretended by any one. And it is believed, that the public right to a common, is equally beyond the power of the sovereign to grant; unless under the power to appropriate property to the national use, and then upon compensation. No one would pretend that a judgment like the one in question would conclude the right of the public to the use of a public street in the city. As the Supreme Court said in the case of the city of Visalia vs. Jacob, 65 Cal., 435, an occupation and obstruction of a public street is a nuisance, and

every continuance of that which was originally a nuisance the law considers a new nuisance, to abate which an action may be brought on behalf of the public.

Mr. Justice McLean, in delivering the opinion in the New Orleans case, at page 734, uses this pertinent language: "It is a principle sanctioned as well by law "as by the immutable principles of justice, that when "an individual acts in ignorance of his rights he shall "not be prejudiced by such acts. And this rule applies "at least with as much force to the acts of corporate "bodies as to those of individuals." And this rule he applied to the circumstances of the case and the acts of the City of New Orleans, claimed to have prejudiced the claims of the city. The applicability of the principle and its pertinency is very obvious in a case like the present, where it is attempted to cut off all the rights of the city and the public, by the judgment relied upon, which did not at all present or involve the merits now presented, nor the rights of the party now plaintiff, which rights, in my judgment, were not involved in the issue presented in the case.

And in 2 Dillon on Municipal Corporations, 3d Edition, Sec. 665, the learned author lays down this doctrine: "It fairly results from the view taken in "this chapter of the nature of the rights of the public "at large in streets and public places, that a judg- "ment by the proprietor of land against a city corpor- "ation where the disputed question was as to the "ownership of the soil, does not conclude or affect the "right of the public to the easement of a street or pub- "lic place, since the public is in these repects repre- "sented by the commonwealth, and such a judgment is "*res inter alios acta* as to the public right."

That doctrine is approved by the Court of Appeals of Virginia in the case of *Warwick et al.* vs. *The Mayor*, 15 Gratton, page 548; the Court saying, "It results from these authorities that no question as to the ease- "ment was or could have been raised in the ejectment, "whether the ownership of the soil remained in the "original proprietor, or vested in the lot owners whose "lots bounded on the street, or was vested in the cor- "poration, did not affect the public easement. As to

" the public, represented by the commonwealth, if " entitled to the easement, a controversy respecting the " ownership of the soil was *res inter alios acta*, and how- " ever determined, having no effect whatever on the " public right." And the same doctrine was approved in *Bolling* vs. *Mayor, etc.*, 3 Randolph, 594.

The doctrine is directly applicable to the case in hand. The case of *Holladay* vs. *The City*, involved alone the absolute title averred on the one side and denied on the other, to the premises in question in that case, and did not and could not involve the public rights represented by the State. The plaintiff being in possession could not bring his ejectment, but filed his bill to establish his title. The merits, so far as the public was concerned were not involved, and remain entirely unaffected by the decision, and may now be enforced by the public in the present action.

I have looked into the various cases involving the question of the title and interests of the city in her lands confirmed by the State, the decree of the Circuit Court and the Acts of Congress, and I am satisfied that the public park and places of the city have been dedicated and confirmed to the city for public uses by the decree of the Circuit Court, the Act of the Legislature of 1858, the Acts of Congress and the patent of the United States, and that the city now holds them for the uses to which they have been dedicated, inalienable and unaffected by the judgment relied upon, and that the present plaintiff is entitled to maintain the present proceeding and abate the nuisances complained of.

Entertaining these views, I must grant the motion for a new trial, and it is so ordered.

HOGE,
JUDGE.

## Addenda. Parts of Act of March 11, 1858.

SECTION 1.

That the plan or map of the Western Addition, reported by the Commission created under an ordinance of the last Common Council of the city of San Francisco, be adopted by this Board, and be declared to be the plan of the city, in respect to the location of squares and lots for public purposes in that portion of the then incorporated limits of said city, lying west of Larkin, and southwest of Johnston streets.

SECTION 4.

The city, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets and sites for school houses, city hall, and the buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections.

SECTION 1.

It shall be the duty of the Mayor to enter, at the proper land office of the United States, at the minimum price, all the lands above the natural high water mark of the Bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the City of San Francisco, as defined in the Act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit, and behoof, of the occupants or possessors thereof, according to their respective interests.

SECTION 3.

The patent issued, or any grant made by the United States to the city, shall inure to the several use, benefit and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name.

Office Supreme Court U. S.
FILED.
JAN 7 1890
JAMES H. McKENNEY,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 1506.

THE CITY AND COUNTY OF SAN FRANCISCO,

PLAINTIFF IN ERROR,

vs.

ANDREW J. ITSELL et al.,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of California.

## BRIEF FOR DEFENDANTS IN ERROR.

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In Error to the Supreme Court of the State of California.

## BRIEF FOR DEFENDANTS IN ERROR.

### STATEMENT.

This is an action in ejectment, brought by the plaintiff in error against the defendants in error, to recover the possession of a tract of land in the City and County of San Francisco, State of California.

The plaintiff alleges in its complaint:

"That plaintiff is, and on and long prior to the 20th day of December, 1883, was seized in fee in trust for the use of the State of California and of the people of the City and County of San Francisco as a public plaza, park, common or square, and entitled to the possession of the

following described real property, situated in said City and County of San Francisco, bounded on the east by Steiner street, south by O'Farrell street, west by Scott street, north by Geary street, being a portion of land known as Hamilton Square, or Plaza." (p. 3.)

And further alleges that the defendants had ousted the plaintiff therefrom, and prayed for the restitution of the premises.

In answer to this complaint the defendants, in addition to other defenses, allege:

1st. A general denial of all the allegations of the complaint, except that the defendants are in possession of certain portions of the land.

2d. That in a former action between the plaintiff in error herein and Edward F. Palmer, the predecessor of these defendants, it had been adjudged by a court having jurisdiction of the parties and of the subject matter, that the said Edward F. Palmer was, at the time of the commencement of said action and at the date of said judgment, the lawful owner in fee simple absolute, of the demanded premises, and that the plaintiff in error herein (defendant in said action) had no estate or title in or to said premises, and that the said defendant, the City and County of San Francisco, had by said judgment been forever thereafter enjoined from asserting or claiming any estate in said premises; that said judgment still remains in full force and effect, and that prior to the commencement of this action the said defendants had succeeded to and acquired the title of said Palmer to their respective lots, portions of the demanded premises. (pp. 4-6).

Upon the issues thus presented the cause was tried by the Court without a jury, and findings of fact were made by said Court.

In said findings of fact the trial court found:

"That plaintiff is not, and was not, at the time of the commencement of this action, the owner or seized in fee in trust for any person, or entitled to the possession of any part of the land described in the complaint, and which is

described in the answers of the above named defendants, or of which said defendants were in possession when the action was commenced." (p. 10.)

"That on the 11th day of September, 1869, one Edward F. Palmer, as plaintiff, commenced an action in the then District Court of the Fifteenth Judicial District of the State of California, in and for the City and County of San Francisco, against the said City and County of San Francisco (the plaintiff in this action), as defendant, and which said court then and there had full and complete jurisdiction of the subject matter of said action and of the parties thereto; and in his complaint in said action the said Edward F. Palmer alleged that he then and there was, and for a long time theretofore had been, the owner and in the possession of a certain tract of land in said complaint described, and described in the answers of the said defendants; and in said complaint it was further alleged that the plaintiff therein claimed title in fee to said tract of land, and that defendant therein (the plaintiff in this action) claimed an interest and estate in said premises adverse to the plaintiff therein; and further alleged that the claims of the said defendants therein were without any right whatever, and that said defendant therein had not any right, title, interest or estate in said premises, nor in any part thereof; and said plaintiff Edward F. Palmer, by said complaint, prayed judgment that he be adjudged and declared to be the owner of the said premises, and that it be adjudged and declared that the said defendants, the City and County of San Francisco, had no estate or interest whatever in said premises, and be debarred from asserting any claim whatever therein.

"The defendant therein, the said City and County of San Francisco, duly appeared in said action and answered said complaint and denied all the allegations of the complaint, except the allegation that it claimed title to said premises adverse to the plaintiff Edward F. Palmer.

"That afterwards said cause was tried by said Court and judgment entered by said Court in said action, whereby it was ordered, adjudged and decreed that the plaintiff Edward

F. Palmer was at the commencement of the action and still was the lawful owner in fee simple absolute of the premises described in the complaint therein, and that the said defendant City and County of San Francisco had not any estate, right, title or interest therein, and that the said defendant City and County of San Francisco be and by said judgment was forever thereafter enjoined, restrained and debarred from asserting or claiming any estate, right, title or interest in said premises or any part thereof. And that said judgment still remains in full force and effect not reversed or otherwise vacated." (pp. 13-15.)

The Court further found that the defendants in this action have by mesne conveyances under said Palmer, subsequent to the entry of said judgment acquired the title of said Palmer to the lands described in their respective answers. (p. 15.)

Upon the findings of fact thus made by the trial court judgment was entered in favor of the defendants and against the plaintiff. (p. 18.)

From the judgment thus rendered the plaintiff appealed to the Supreme Court of the State of California.

The appeal was taken upon the Judgment Roll, without any bill of exceptions, and without presenting to the appellate court any of the evidence upon which the findings were based, or any record of the proceedings at the trial of the cause.

Upon hearing the appeal the Supreme Court of California affirmed the judgment of the trial court. (p. 21.)

The judgment of the Supreme Court of California affirming that judgment has been brought to this court on a writ of error.

## ARGUMENT.

This Court has no jurisdiction to review the judgment of the Supreme Court of the State of California rendered herein.

I.

It does not appear by the record that any Federal question was raised or presented to said Supreme Court for its decision, or that any Federal question or any of the questions specified in Sec. 709, Rev. Stats., were decided by said court.

The decision of said court was made upon the Judgment Roll in said action, and in that there is nothing in the record to indicate that either the plaintiff or the defendants derived or claimed title to the demanded premises under the United States.

"From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record not only that a Federal question was raised and presented to the highest court of the State for its decision, but that it was decided or that its decision was necessary to the judgment or decree rendered in the case."

*Chouteau* v. *Gibson*, 111 U. S. 200.

"If there has been no such decision in the suit there can be no re-examination of the judgment here. It is what was actually decided that we are to consider, not what might have been decided, and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show, either in express terms or by fair implication, not only the question, but its decision. It is not enough to find by searching, after judgment, that the requisite question might have been raised and presented for decision. It must appear that it was actually raised and actually decided."

*Detroit Railway Co.* v. *Guthard*, 114 U. S. 136.

"It has been repeatedly decided under Section 709 of the Revised Statutes that, to give this Court jurisdiction of a Writ of Error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest Court in the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

*De Saussure* v. *Gaillard*, 127 U. S. 234.

The only part of the record in which it is intimated that any Federal question was involved in the decision by said Court, is in the petition for the Writ of Error in which the Plaintiff in Error states :

"That in said suit there was drawn in question the validity of a statute of the United States, to wit: an Act entitled (Chapter CXCIV) 'An Act to expedite the settlement of titles to lands in the State of California, passed July 1, 1864,' and the authority exercised by said City and County of San Francisco under said Statute of the United States, and that said decision is against their validity. That said decision, judgment and decree are against the validity of the statute in this, that said statute vested in said City and County of San Francisco an irrevocable trust and inalienable title in the lands and premises described in the complaint in this action for a public use, and that the decision, judgment and decree wholly destroy said trust and alienate said lands." (p. 26.)

Aside from the fact that this statement in the Petition for the Writ of Error is without any support in the record, it is sufficient to say that the Petition itself is no part of the record, and cannot be considered for the purpose of determining whether any Federal question was presented in the Supreme Court of the State.

"We act only upon the record of the court below and of that record the Petition for the Writ of Error formed no part."

*Clark* v. *Penn*, 128 U. S. 397.

The "argument" presented in behalf of the Plaintiff in Error may serve as a compendium of the history of the pueblo of San Francisco, but aside from its preliminary statement that "this is an action of ejectment," it is entirely outside of the record in this case, and does not illustrate any error committed by the Supreme Court of the State in its decision.

The title of the City to its lands does not depend upon the Act of July 1, 1864, referred to by Plaintiff in Error, but, as is said by this Court in *Trenouth* v. *San Francisco* (100 U. S. 255), "rests upon the decree of the ~~Supreme~~ Circuit Court as entered on the 18th of May, 1865, and the confirmatory Act of Congress of March 8th, 1866."

If, however, this Court shall take into consideration the Act of July 1st, 1864, relinquishing and granting to the City of San Francisco all the right, title and interest of the United States to the land within the corporate limits of the City, as defined in its charter of April 15th, 1851; the decree of the Circuit Court of the United States for the District of California, made May 15th, 1865, confirming the claim of the City to the lands of the pueblo, and the Act of Congress of March 8th, 1866, relinquishing and granting to the City all the right, title and interest of the United States in the land so confirmed, and shall assume that the land in controversy is part of the lands so granted and confirmed, and that it was by the City of San Francisco regularly reserved and dedicated as a public park by virtue of the ordinances referred to in said Acts, it follows that the United States have no interest in the land, and that the questions concerning its title have passed from the dominion of Federal investigation, and, in determining the ownership of such land, have become simply rules of construction to be determined by the State Court.

In *Hoadley* v. *San Francisco* (94 U. S. 4), the same questions involved in the case now before the Court, were presented. In that case it was claimed that a Federal question was presented by virtue of the construction to be given to

the Act of July 1st, 1864, and of the ordinances referred to therein, and this Court, in its opinion, uses the following language :

"The questions involved did not arise under the laws of the United States, but under the ordinances of the City as ratified by the Act of the Legislature. The Act of Congress operated as a release to the City of all the interest of the United States in the land. The title of the United States was vested in the City. Whether the City took the beneficial interest in the property, as well as the legal title, depended upon the effect to be given to the Act of the Legislature and to the ordinances, *and not upon the Act of Congress.*"

II.

The judgment of the trial court was rendered by it and was affirmed by the Supreme Court upon defenses independent of that in which plaintiff in error claims a Federal question was involved, and which are of themselves sufficient to support the judgment.

The opinion of the Supreme Court of the State, rendered in this case, is set out at large in the record herein. (pp. 21–23.)

If this Court shall feel at liberty to examine that opinion under the rule indicated in *Kreiger* v. *Shelby R. R. Co.* (125 U. S. 44), (although the reason given in that case for such examination does not apply in the present case, since the statutes of this State do not require such opinions to be recorded) (C. C. P. Sec. 53), it will find that the only question which can be claimed to be Federal that was considered by the Court was not necessary to the judgment rendered in the case, nor was the opinion or decision of the Court thereon *against* the right claimed by the Plaintiff in Error under the laws of the United States.

In *Murdock* v. *City of Memphis* (20 Wall. 635) this Court held, and it has ever since been held :

1. That it is essential to the jurisdiction of this Court over the judgment of a State court that it shall appear that one of the questions mentioned in the Act (Sec. 709 Rev. Stats.) must have been raised and presented to the State Court.

2. That it must have been decided by the State court or that its decision was necessary to the judgment or decree rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

In the present case neither of these essentials exist.

1. It does not appear that any of the questions mentioned in the Act was raised or presented to the State court.

2. Such question was not decided by the State court, nor was any decision of such question necessary to the judgment or decree rendered in the case.

3. There was no decision by the State Court *against* any right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws or authority of the United States.

From the said opinion of the Supreme Court of the State it appears that the judgment of the court below was affirmed solely upon the ground that the judgment rendered against the plaintiff in error in the suit of Palmer was a bar to this action. That judgment had been pleaded by the defendants as an estoppel against the plaintiff, and the issue raised thereon had been found by the Court in favor of the defendants and against the plaintiff, and was in and of itself a sufficient defense to the plaintiff's cause of action. Whether or not this judgment was a bar to the plaintiff's cause of action was the only question which was necessarily decided by the Court in affirming the judgment of the trial court.

Inasmuch as the Court affirmed the judgment of the trial court upon this defense, whatever it may have said in its

opinion respecting the action of the court upon other questions was unnecessary to its judgment, and cannot be considered as having been a "decision" by it.

That judgment had been rendered by a court having jurisdiction of the parties and of the subject matter. It was a final adjudication of the respective rights of the parties to the premises in controversy.

In its opinion the Court, in holding that this judgment is a bar to the action, says:

"This precise question was decided in *San Francisco* v. *Holladay* [erroneously printed *Holladay* v. *San Francisco*], 76 Cal. 18, and that decision is conclusive of this branch of the case."

In *San Francisco* v. *Holladay* (76 Cal. 18), referred to by the Supreme Court, that Court used the following language:

"If the land has ever been dedicated to the public use, such dedication must have been before the passage of the Act of July 1, 1864, at least before the commencement of the action, December 17, 1864. In the action referred to the same acts which are here claimed as acts of dedication, were relied upon by the defendant therein, plaintiff herein. The Court there necessarily held, in view of its judgment, that no dedication had ever been made. It would seem, therefore, that the matter is *res judicata*, and that the city is barred from further litigation of the question and estopped from denying the fact.

"The particular matter litigated in that suit was whether the City held the fee in trust for the people or at all, and it was adjudged therein that the City had no right, title or interest in the land.

"The judgment in that case was not appealed from, and is final so far as the City is concerned. It quieted the title of the plaintiff as against any and all claims of the defendant therein."

Upon the effect of the former judgment as a bar to the present action, we refer also to Cooley's Const. Lim., p. 47. See also, *Miles* v. *Caldwell*, 2 Wall. 35.

The trial court further found that at the commencement of this action the plaintiff was not the owner, or seized in fee in trust for any person, or entitled to the possession of any part of the land described in the complaint. (p. 10.)

Upon this finding the defendants were entitled to judgment, and judgment was accordingly entered by the trial court in their favor. The Supreme Court affirmed the judgment without making any comment or decision upon this finding.

As there is nothing in the record tending to show upon what evidence this finding was based, it is clear that there is nothing from which it can be inferred that any Federal question was presented, upon the determination of which this finding was based, and it must also be assumed in support of the judgment of the trial court that the evidence upon which this finding was made was both competent and sufficient.

If, for the purpose of making this finding, no Federal question was presented for the determination of the trial court, or of the Supreme Court upon appeal, the judgment of the trial court and its affirmance by the Supreme Court upon this finding, is conclusive of the rights of the parties.

Irrespective of the special defenses pleaded by them, if the Plaintiff was not the owner or entitled to the possession of the land sued for, it was immaterial what title the defendants had.

## III.

It is the settled rule of this Court that upon a Writ of Error to a State court, which has affirmed several defenses to an action, either one of which, not involving a Federal question, is sufficient to sustain its judgment, this Court will affirm the judgment without considering a Federal question involved in another defense, or expressing any opinion upon it, even though such question was wrongfully decided.

*Jenkins* v. *Loewenthal*, 110 U. S. 222.

In *McManus* v. *O'Sullivan* 91 U. S. 578, this Court held that it has no jurisdiction to re-examine the judgment of a State court where a Federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.

*Chouteau* v. *Gibson*, 111 U. S. 200, is almost identical with the present case. In that case the defendant in error had set up a judgment in his favor in a suit brought by him against the plaintiff in error in which, as he alleged, the identical matters presented in that case had been directly passed upon and adjudicated between the parties. The State Supreme Court, in deciding the case, sustained that defense without considering the Federal questions alleged to exist in the case. The judgment of the State Court having been brought to this Court upon a Writ of Error, this Court says:

"It is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the State Court is not reviewable here. The Federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a Federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties.

"The court below has decided that the judgment in that action in favor of Gibson was in its legal effect a judgment that Chouteau and Moffit had no title to the land in controversy. Consequently, that judgment was a bar to this action and precluded the court below, as well as this court, from reopening the original litigation and considering again the questions that were put at rest between the parties by the decision in their former suit.

"It is apparent, therefore, that no Federal question which there may have been in the case was decided by the State court, and that the decision of such a question was not necessary to the final decree rendered."

See also:

*Adams County* v. *B. & M. R. R. Co.*, 112 U. S. 123;
*Chapman* v. *Goodnow*, 123 U. S. 548;
*Marrow* v. *Brinkley*, 129 U. S. 178.

Counsel for plaintiff in error has appended to his argument the opinion of Mr. Justice HOGE, rendered in the Superior Court of San Francisco, as to the effect of a judgment against the city, and urges its consideration by this Court.

We have no comment to make upon that opinion, except to call the attention of the Court to the fact, as shown upon page 17 of counsel's brief, that the opinion is based upon the fact that the judgment in that case was rendered upon an action commenced in December, 1864, a point of time prior to the aforenamed decree of the Circuit Court in 1865, and the confirmatory Act above referred to of March 8, 1866; whereas in the present case the action in which the judgment was rendered was commenced September 11, 1869, after the plaintiff in error had obtained all the title which it ever had to the lands in question.

Moreover, the trial court in this case found:

"That the plaintiff in this action has no other or different title or claim of title to the premises in controversy than it had at the time of the commencement of said action of Edward F. Palmer." (Fol. 35.)

Irrespective of this fact, however, the question whether the judgment rendered in the action of Palmer vs. the plaintiff in error was or was not a bar to this action, as well as the question whether or not the judgment discussed in the opinion of Mr. Justice Hoge was a bar to that action, is not a Federal question, but is simply a question of procedure to be determined by the State court, and its determination thereon is not reviewable by this Court.

We respectfully submit that upon the record in this case it fully appears that this Court has no jurisdiction to review the judgment of the Supreme Court, and ask that under the principles heretofore declared by this Court in cases of this character, it will affirm that judgment.

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